Court File No. CV-12-9667-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

BOOK OF AUTHORITIES OF THE APPLICANT

(Lift Stay Motion returnable April 20, 2012)

Dated: April 19, 2012

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Tab 1

Indexed as:

Ontario New Home Warranty Program v. Chevron Chemical Co.

APPLICATION UNDER the Class Proceedings Act, 1992
Between
Ontario New Home Warranty Program, Kathy Adetuyi and Andrew Duke, plaintiffs, and
Chevron Chemical Company, Hart & Cooley, Inc., Eljer Manufacturing Inc. cob as Selkirk Metalbestos, Underwriters' Laboratories of Canada, Underwriter's Laboratories Inc., Armstrong Air Conditioning Inc., Consolidated Industries Corp., Welbelt Corporation, Carrier Canada Limited, Evcon Supply Inc., Evcon Industry, Inc., Goodman Manufacturing Co., Ltd., Quietflex Manufacturing Company, L.P., Wabco Standard Trane Inc., Inter-City Products Corporation (Canada), Inter-City Products Corporation (U.S.), Lennox Industries (Canada) Ltd., Nordyne, Inc., Rheem Manufacturing Company, York International Ltd. and CMIL Industries Inc., cob. as DMO Industries, the Canadian Gas Association, Canadian Gas Research Institute, International Approval Services Canada Inc., Consumers Gas Utilities Ltd., Union Gas Limited, Centra Gas Ontario Inc., Superior Propane Inc., Superior Propane Inc./Superieur Propane Inc., Southcorp Water Heaters USA, Inc. and American Water Heater-West Inc. and American Water Heater-East Inc. all cob as American Water Heater Group, Slant/Fin Ltd./Ltee, Weil-McLain division of Marley Canadian Inc., Her Majesty the Queen in Right of Ontario, and General Electric Company, defendants

[1999] O.J. No. 2245

46 O.R. (3d) 130

99 O.T.C. 384

37 C.P.C. (4th) 175

88 A.C.W.S. (3d) 1138

Court File No. 22487/96

Ontario Superior Court of Justice

Winkler J.

Heard: June 8-10, 1999.
Judgment: June 17, 1999.

(37 pp.)

Counsel:

C. Scott Ritchie, Q.C. and Michael Eizenga, for the plaintiffs.
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Robert Bell and Peter Ruby, for Hart & Cooley Inc.
Lawrence Thacker, for Selkirk Metalbestos.
Marcus Koehnen and Kathryn Manning, for Underwriters' Laboratories of Canada.
Paul Martin, for Underwriters' Laboratories Inc.
Marilyn Field-Marsham, Randy Pepper and Stephen Lamont, for Armstrong Air Conditioning Inc., Evcon Supply Inc., Evcon Supply Inc., Inter-City Products Corporation (Canada), Inter-City Products Corporation (U.S.), RHEEM Manufacturing, York International Ltd. and Lennox Industries.
John Callaghan, for Consolidated Industries, Welbilt Industries, and Nordyne Inc.
F. Paul Morrison and Frank J. McLaughlin, for General Electric Company.
J.A. Prestage, for Carrier Canada.
C. Stephen White and Ellen Bessner, for Goodman Manufacturing and Qietflex Manufacturing company, L.P.
James Norton, for Wabco Trane Standard Inc.
John C. Cotter, for American Water Heater Group.
Dominic Clarke, for the Canadian Gas Association, Canadian Gas Research Institute and International Approval Services Canada Inc.
Jean Iu, for Her Majesty the Queen in Right of Ontario.
Cynthia Sefton and Murdoch R. Martin, for Consumers Gas Utilities Ltd.
Glenn Leslie, for Union Gas Ltd. and Centra Gas Ontario Inc.
No appearances for CMIL Industries Inc., Superior Propane, Slant/Fin Ltd./Ltee and Weil-Mclain division of Marley Canadian Inc.

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1 **WINKLER J.**:-- This is a motion to approve the settlement of this action between the plaintiffs and Chevron Chemical Company, Hart & Cooley, Inc., Eljer Manufacturing Inc. c.o.b. as Selkirk Metalbestos, General Electric Company, Her Majesty the Queen in Right of Ontario, Goodman Manufacturing Co. Ltd., CMIL Industries Inc. cob as DMO Industries, Nordyne, Inc., Wabco Standard Trane Inc., Carrier Canada Limited, Slant/Fin Ltd/Ltee, Weil-McLean division of Marley Canadian Inc. and Underwriter's Laboratories Inc. (the "Settling Defendants").

2 The plaintiffs also seek class certification pursuant to s. 5 of the Class Proceedings Act, 1992 with respect to the Settling Defendants.

3 The plaintiffs seek to discontinue the action against certain other defendants., namely Consumers Gas Utilities Inc., Union Gas Limited, Centra Gas Ontario Inc., Superior Propane Inc., The Canadian Gas Association, the Canadian Gas Research Institute and International Approval Services Canada Inc. This motion was adjourned at the hearing pending the disposition of the motions for certification and settlement approval.

4 The Plaintiffs propose to bring a subsequent motion for certification for litigation purposes with respect to the Non-Settling Defendants which consists a group of furnace manufacturers represented by one law firm and Underwriters' Laboratories of Canada ("ULC").

The Nature of the Claim

5 This is a product liability claim concerning residential mid-efficiency gas or propane furnaces, boilers and hot water heaters with High Temperature Plastic Vent ("HTPV") exhaust systems. The claim alleges negligent design, manufacture, negligent misrepresentation, breaches of warranty and misrepresentation, negligent approval, breach of fiduciary duty, and failure to warn.

6 The action is a proposed class proceeding brought by the Ontario New Home Warranty Program ("ONHWP") and two individuals, as representative plaintiffs. The plaintiff class consists of some 11,000 Ontario homeowners who installed mid-efficiency furnaces with the allegedly defective plastic venting pipes.

7 ONHWP makes a subrogated claim in place of many new homeowners whom it paid to repair or replace appliances and HTPV piping. The two individual representative plaintiffs were homeowners with heating systems using HTPV. The settling defendants include Chevron, Hart and GEC, three companies against which allegations have been made relating to HTPV. The Non-Settling Defendants are primarily furnace manufacturers, namely, Armstrong Air Conditioning Inc., Evcon Supply Inc., Evcon Industry Inc., Inter-city Products Corporation (U.S.), Lennox Industries (Canada) Ltd., RHEEM Manufacturing Company and York International Ltd. In addition, the defendant Underwriters Laboratory is included in the non-settling group.

Background

8 Prior to the 1980's, gas or propane heating appliances used chimneys or vertical metal vents to carry exhaust gases out of homes and other buildings. In the early 1980's, mid-and high-efficiency appliances were introduced into the marketplace. These appliances could be vented horizontally through the side walls of buildings. The exhaust gas of a mid-efficiency furnace is vented at a high temperature. With the horizontal vent pipes, there was a possibility that the exhaust gas would cool during the venting process, and that the by-products in the gas would form acidic condensates in the horizontal vent pipes. These acidic condensates were known to be corrosive to metal vent pipes.

9 In response to this problem of corrosion, High Temperature Plastic Venting ("HTPV") was developed. As a result of the low cost and the corrosion resistance of HTPV, heating systems combining HTPV and mid-efficiency appliances came into wide-spread use.

10 The Plaintiffs allege that mid-efficiency gas or propane appliances, vented with HTPV, result in a defective product (the "Heating System"). As a result of residual stresses incurred during manufacture, thermal expansion and contraction of the pipe, and a build-up of acidic condensate during in-service use, HTPV pipes in the Heating System were prone to cracking or separating at the joints.

This had the potential to release poisonous carbon monoxide gas into the building. Neither the appliances or the venting pipes were designed with any type of safety device which would prevent defective operation.

11 Prior to being marketed, these Heating Systems were submitted to the relevant regulatory bodies for product approval. The National Standards System, a Federation of independent organizations working towards the development of voluntary standardization in Canada is coordinated by the Standards Council of Canada ("SCC"). The SCC delegates the function of setting standards and approving testing procedures to various standards organizations which appoint key people from the relevant industry to develop standards in relation to particular products.

12 Once a standard has been agreed upon by SCC delegated members, a final draft of the standard is published. This standard must be accepted by the Ministry of Consumer and Commercial Relations ("MCCR") in the Province of Ontario before a product can be marketed. After the standard is accepted by the MCCR, manufacturers submit their product to testing and certification agencies to test the product against the standard accepted by the MCCR, in order to certify that the product meets the relevant standard.

13 In addition to the requirement for the certification of Heating Systems, each appliance manufacturer must approve and specify one or more vent product to be installed in combination with its appliances. No vent product other than those which are approved and specified by the appliance manufacturer is permitted to be installed in combination with the appliance.

14 All of the HTPV products which are the subject of this proceeding went through the process set out above. However, in response to a series of complaints concerning defective heating systems, the MCCR compiled Inspection Reports and found a high failure rate in the HTPV. As a result, in March 1994 the MCCR issued a consumer alert warning about the possibility that vent pipes found in the heating systems might crack or separate at the joints allowing poisonous gases to escape into homes.

15 On Sept. 12, 1995 the Ontario Government, through the Ministry of Consumer and Commercial Relations, issued a Director's Safety Order in respect of heating systems with HTPV. The Director's safety order stated that certain brands of plastic heating vents had been found to be defective and required all homeowners whose furnaces incorporated those vents to replace them by August 31, 1996. Pursuant to the order, natural gas utilities and propane distributors were prohibited from supplying gas after August 31, 1996 to any building in which the vents had not been replaced. The Director's Safety Order states in relevant part:

Director's Safety Order
Heating Systems with High-Temperature Plastic Vents

> Mounting engineering and technical evidence in Ontario and elsewhere confirms that heating system's using high-temperature plastic vents are defective, that permanent failure of the vents will take place and that the risk of failure increases with length of service. Specific heating systems using plastic vents bearing the name Plexvent, Sel-vent and Ultravent are affected. Over the past two years, four bulletins and a number of consumer advisories have been issued in Ontario as this evidence has been accumulating.

> To eliminate the risk associated with these systems, owners are required to correct them with a fully approved heating system prior to August 31, 1996. The options for correction consist of: (a) an existing appliance with an approved alternate vent, if available, or (b) a replacement heating system consisting of vent and appliance. Temporary repairs made using improved plastic materials are not acceptable corrections after August 31, 1996.
>
> After August 31, 1996, natural gas utilities and propane distributors will no longer be permitted to supply gas to these defective systems in Ontario.

16 In consequence, all owners of such furnaces were required to replace the vents by the Director's deadline.

17 In response to the Director's Safety Order relating to the defective Heating Systems, the ONHWP was required to establish a program to identify, administer and repair those Heating Systems covered by the ONHWP warranty program.

18 Where there was an approved alternative vent product available, the predominant corrective measure involved the replacement of the HTPV with B-Vent and a side-wall power venter, although owners were given a choice of receiving a credit towards the installation of a high efficiency heating system as an alternative. In situations where there was no approved alternative venting product, ONHWP replaced the defective Heating System with a high-efficiency heating system.

19 Not all of the homeowners with defective Heating Systems had the benefit of ONHWP coverage. Nevertheless, these homeowners were also required to comply with the Director's Safety Order. In order to comply with the Director's Safety Order, repairs similar to those described above were effected by the non-covered homeowners at their own cost.

Settlement Discussions

20 In early 1996, and continuing thereafter, settlement discussions have taken place in this action. To facilitate this process and to bring it to a conclusion, a mediation was conducted in July 1998 before a prominent American mediator, Mr. Kenneth Feinberg, who is experienced in resolving complex litigation proceedings. All Defendants were invited to participate in this process but the Non-Settling Defendants, other than Underwriters Laboratory, chose not to attend or make submissions.

21 The mediation before Mr. Feinberg resulted in a settlement with the Defendants GEC, Hart and Chevron. Subsequent to the execution of the Settlement Agreement by these Defendants, the Plaintiffs have settled their claims with the following additional Defendants:

> Eljer Manufacturing Inc., c.o.b. as Selkirk Metalbestos;
>
> Her Majesty the Queen in Right of Ontario, represented by the Ministry of Consumer and Commercial Relations;
>
> Nordyne Inc.;
>
> Weil McLean division of Marley Canadian Inc.;

Wabco Standard Trane Inc.;

Slant/Fin Ltd./Ltee.;

American Water Heater;

Underwriter's Laboratories Inc.;

22 In addition to these settlements, the Plaintiffs have reached an agreement with the Defendant DMO Industries, within the context of the receivership affecting that corporation, for a $50,000.00 payment.

23 The Plaintiffs have also reached agreements with the Defendants Goodman and Carrier, who have each conducted voluntary self-administered repair programs.

24 The Plaintiffs propose to discontinue the action against the following Defendants:

(a) Canadian Gas Association;
(b) Canadian Gas Research Institute;
(c) International Approval Services Canada Inc.
(d) Consumers Gas Utilities Ltd.;
(e) Union Gas Ltd.;
(f) Centra Gas Ontario Inc.;
(g) Superior Propane Inc.; and
(h) Superior Propane Inc./Superieur Propane Inc.

25 The plaintiffs intend to continue with the litigation against the following defendants:

(a) Underwriter's Laboratories of Canada
(b) Armstrong Air Conditioning
(c) Evcon Supply Inc./Evcon Industry Inc.
(d) Lennox Industries
(e) RHEEM Manufacturing
(f) Inter-City Corp. (Canada)/Inter-City Corp. (U.S.)
(g) York International Ltd.

The Settlement

26 The plaintiffs now seek certification against the Settling Defendants, concurrently therewith approval of the settlement in accordance with s. 29(2) of the Class Proceedings Act, and judgment in accordance with the provisions of the settlement agreement achieved through the mediation process. The settlement provides compensation both to ONHWP and to those individual claimants who were not covered by ONHWP and were thus forced to replace the defective Heating Systems at their own cost.

27 The compensatory amounts provided through the settlement are based upon ONHWP's costs to repair the defective systems. ONHWP's total repair costs averaged $1,160 per unit, plus internal administrative costs of $170.00 per unit. The mediated settlement figure is $800.00 per unit, exclusive of administration costs. This settlement figure takes into consideration litigation risk, the delays as-

sociated with this complex multi-party litigation, and the Settling Defendant's assertion that the replacement costs were unreasonably high.

28 From the mediated amount of $800.00 per unit; the Settling Defendants and the plaintiffs agreed that the Settling Defendants proportionate liability was to be fixed at 65%. Consequently, ONHWP's claim as against the Settling Defendants was settled on the basis of a lump sum payment for all such claims on the 65% proportionate share of the $800, plus amounts for party and party costs, disbursements, interest, and claims administration. The total ONHWP settlement figure amounts to $5,230,000.00.

29 The Non-ONHWP claims were also settled on this basis, that is, 65% of the mediated $800.00 repair cost figure.

30 In addition, the Settling Defendants will be responsible for payment of the cost of administering the claims approval process for Non-ONHWP claims. The proposed Claims Administrator is Business Response Inc., a company located in St. Louis, Missouri ("BRI"). BRI is also the Claims Administrator in a similar action in the United States and is experienced in administering this type of settlement.

31 Non-ONHWP claimants will be able to take advantage of a simple claims approval process in which they will be compensated upon producing a proof of repair. This process will reduce legal and administrative costs and will allow claims to be processed quickly without the need for individual claimants to engage a lawyer. The period for claims submission will be five months from the mailing of the Notice of Certification and Settlement Approval.

32 A Non-ONHWP class member may be excluded from the Agreement by completing an Opt Out Form which may be obtained from the Claims Administrator. The Opt Out Deadline will be 60 days from the mailing of the Notice of Certification and Settlement Approval.

33 By virtue of this Settlement, Class Members will be eligible to receive payments within a few months of the Notice of Certification and Settlement Approval. Absent this agreement, in the face of complex multiparty proceedings, it could be a matter of years before any benefits are received by the Class.

34 The Settling Defendants support the plaintiff's motion for approval of the settlement, as long as the judgment approves the entire settlement agreement, especially those provisions which would prevent the Non-Settling Defendants from making any further claims for contribution and indemnity against the Settling Defendants in respect of any damages award to the plaintiffs at trial.

35 These clauses are the only aspects of the settlement agreement that are subject to opposition by the Non-Settling Defendants in this proceeding. Under the contested provisions, the court would be issuing an order preventing the Non-Settling Defendants from making any further claims against the Settling Defendants in relation to any damages suffered by the plaintiffs.

36 The contentious provisions are contained in clause 13 of the Settlement Agreement. They state, in pertinent part:

> ... all claims for contribution, indemnity, subrogation or other claims over shall be barred in accordance with the following terms:
>
> ...

d) The plaintiffs shall not make joint and several claims against the Non-Settling Defendants or Joining Defendants but shall restrict their claims to several claims against the Non-Settling Defendants such that the plaintiffs shall be limited to the degree of liability proven against the Non-Settling Defendants at trial, but in no event shall such liability of the Non-Settling Defendants be greater than 35% of the total damages proven at trial as against each Non-Settling Defendant.

e) All claims for contribution, indemnity, subrogation or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, for or in respect of the subject matter of the Class Actions by or against any Non-Settling Defendants or any other person or party are barred by or against the Settling Defendants and Joining Defendants. CLARITY NOTE: The bar order deals only with claims over and is not intended to bar bona fide independent and direct claims and causes of action between settling and non-settling defendants for damages other than those claimed by the Representative Plaintiffs and the Plaintiff Class.

f) Except as otherwise provided herein, nothing in this Judgment shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than Settling Defendants and Joining Defendants.

g) Nothing in this Judgment affects any rights that the Non-Settling Defendants may have to move for leave for discovery and production of documents respecting the Settling Defendants and Joining Defendants pursuant to the Rules of Civil Procedure and, in particular, Rules 31.10 and 30.10.

37 The plaintiffs and Settling Defendants contend that the settlement, taken as a whole, is fair and reasonable. They assert that the contested provisions contain adequate safeguards for the Non-Settling Defendants. They point to the fact that the remaining claims of the plaintiffs have been converted from "joint and several" to several claims and that under this "several" approach, the liability of the Non-Settling Defendants will be capped at 35% of the total damages proven at trial. Indeed, the plaintiffs and the Settling Defendants state that the Non-Settling Defendants can only benefit from this provision because it limits their maximum exposure to liability in damages to the plaintiffs regardless of the ultimate apportionment of the liability as determined by the trial judge.

38 The plaintiffs and Settling Defendants characterize the prohibitive provisions as a "bar order". In support of their submissions urging the court to accept these provisions, they rely on "substantial U.S. Authority". The plaintiffs assert in their factum that "bar orders are a common mechanism used by the courts in the United States to assist in the management of complex litigation, and to encourage settlement and provide certainty to litigants while enabling them to reduce litigation costs."

39 I am unable to accept these American authorities as being dispositive of the issue here. In many instances, the American cases turn on specific statutes providing for the issuance of "bar orders." Furthermore, even where such orders have been granted on a common law basis in the United States, the influence of the statutory regime cannot be ignored.

40 I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the Class Proceedings Act provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on

such terms as it considers appropriate." This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

41 By including ss. 12 and 13 in the Act, the legislature has given the Court a flexible tool for adapting procedures on a case specific basis. As stated in the Report of the Attorney General's Advisory Committee on Class Action Reform at 37:

> [These sections describe] the general power of the Court to control its own process and to develop procedures as needed from case to case. (Emphasis added.)

42 In view of the fact that it is apparent that a court has the statutory discretion to issue the order asked for, on appropriate terms, I turn to the objections raised by the Non-Settling Defendants. These defendants oppose the order sought on the grounds that the prohibitive provisions would prejudice them, substantively and procedurally, in presenting any defence that they might have. The Non-Settling Defendants do not object to any other terms of the settlement.

43 The plaintiffs and the Settling Defendants take the position that the Settlement Agreement must either be approved in toto or rejected by the court. Sharpe J., relying on Court of Appeal authority, enunciated this approach in Dabbs v. Sun Life Assurance Co., [1998] O.J. No. 1598 (Gen. Div.). He stated at para. 6:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

44 In respect of the contention of substantive prejudice, the Non-Settling Defendants assert that they have certain rights under ss. 1 and 5 of the Negligence Act, R.S.O. 1990, c. N.1 to pursue claims against the Settling Defendants for contribution and indemnity. Thus, they state, this court has no jurisdiction to prohibit the Negligence Act claims because to do so would derogate from a substantive right. Derogation of substantive rights, it is argued, is beyond the power bestowed on the court by the provisions of the purely procedural Class Proceedings Act. In addition, they contend that they have independent claims founded in negligence and negligent misrepresentation against the Settling Defendants and that part of the damages claimed, based upon these causes of action, will include amounts they may be required to pay to the plaintiffs as a result of the trial.

45 Moreover, the Non-Settling Defendants claim that the prohibiting provisions contained in the settlement agreement are fundamentally unfair at a procedural level because the provisions deprive them of the ability to effectively ensure that they bear only their fair share of any liability to the plaintiffs. Specifically, they assert that they will be precluded from conducting effective discovery and denied evidence at trial necessary to establish the respective degrees of fault as between themselves and the Settling Defendants. This is especially prejudicial, they contend, in a context where the main issue at trial will be the nature of alleged defects in products manufactured by the Settling Defendants, rather than by the Non-Settling Defendants.

46 As a practical necessity, I will deal with the contested provisions of the Settlement Agreement prior to determining the other issues on this motion. If the provisions must be rejected on the basis of the objections raised by the Non-Settling Defendants, then the other issues will be rendered moot.

Analysis

47 The Non-Settling Defendants contend that this court lacks jurisdiction to approve the settlement and issue a concomitant order containing the prohibitive provisions because of the substantive prejudice that will enure to them. The prejudice arises in part, they assert, because of the contested provisions represent an abrogation of their rights under the ss. 1 and 5 of the Negligence Act.

48 These sections provide:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
> 5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

49 I bear in mind the words of Farley J. in Canada v. Curragh, [1994] O.J. No. 1452 (Gen. Div.), in another context, as a starting point in the analysis of the jurisdictional objection raised by the Non-Settling Defendants. He stated at para. 1:

> ... jurisdiction cannot be conferred by agreement. Jurisdiction will only be assumed (i.e. undertaken) by this Court when the Court determines that it truly has jurisdiction based upon the legal principles applicable. It will not be taken by this Court merely because it will convenience the parties.

50 Moreover, this court has noted on multiple occasions that there is no jurisdiction conferred by the Class Proceedings Act to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.

51 While I have full regard to the preceding caveats, in my view, the Non-Settling Defendants assertion that the Negligence Act affords them substantive rights which will be abrogated by the proposed Settlement Agreement is untenable. When the prohibitive provisions contained in the agreement are considered in total, it is apparent that they affect no claim of the Non-Settling Defendants that could be successfully asserted against the Settling Defendants under the Negligence Act or otherwise.

52 In essence, a claim for contribution and indemnity as between joint tortfeasors is a derivative claim. As stated by David Cheifetz in Apportionment of Fault in Tort, (Aurora: Canada Law Book, 1981) at 18:

> The basis of the claim for contribution and indemnity is a breach of duty owed by the tortfeasor subject to the claim of the injured person, not to the tortfeasor claiming contribution.

53 Entitlement to the claim only flows from a finding of joint liability between tortfeasors, and a requirement to pay damages, to the plaintiff. In those cases, the trial judge apportions liability as between the defendants, but the plaintiff may obtain satisfaction of the entire judgment from either of them. In the absence of a contractual obligation for indemnification, each of the defendants, on the other hand, has a right to claim contribution and indemnity from the other in accordance with the apportionment of liability found at trial. However, neither defendant may recover from the other any amount attributable to its own negligence. The responsibility for the negligence of each defendant must therefore be borne by that defendant.

54 Here, the Settling Defendants have abandoned any claim for contribution and indemnity as against the Non-Settling Defendants. In addition, the plaintiffs have chosen to seek damages only in the amount for which the Non-Settling Defendants are "severally" liable.

55 In the result, the rights provided to the Non-Settling Defendants under s. 1 of the Negligence Act form part and parcel of the Settlement Agreement. There will be no claim for contribution and indemnity as against them by the Settling Defendants. On the other hand, since they will only be required to pay damages in accordance with their own negligence and liability to the plaintiff, if any, they will have no claim for contribution and indemnity against the Settling Defendants in respect of any such payment.

56 The right provided under s. 5 of the Negligence Act is of a different nature in that it allows the Non-Settling Defendants to join third parties who are not already party to the action. It is apparent, however, that the intent of this section is to permit a defendant to have the opportunity of limiting its liability to the plaintiff to that for which it is actually responsible. As such, there can be no concern that the rights under s. 5 will be abrogated in this case. The protections it affords have likewise been incorporated into the Settlement Agreement. The Settling Defendants have been party to the proceedings and are now attempting to settle their liability and extricate themselves. In so doing, they have accepted a proportion of the liability but, more so, by virtue of their agreement with the plaintiffs, there are clauses which prevent the plaintiffs from obtaining any damages from the Non-Settling Defendants in excess of the Non-Settling Defendants' actually liability to the plaintiffs.

57 The Non-Settling Defendants have not delivered a statement of defence to the plaintiffs' claim, nor a statement of claim against the Settling Defendants in these proceedings. In argument on this motion, counsel for the Non-Settling Defendants gave an undertaking that it is their intention to commence an action against the Settling Defendants alleging causes of action in negligence and negligent misrepresentation as against them.

58 The Non-Settling Defendants assert that the Settling Defendants owed them a duty of care which was negligently breached. This negligence, it is stated, is the direct cause of any damages that the Non-Settling Defendants may be required to pay to the plaintiffs. In consequence, the Non-Settling Defendants contend that this negligence gives rise to an independent tort claim, separate and apart from a claim for contribution and indemnity against the Settling Defendants. It is the position of the plaintiffs and the Settling Defendants that such a claim would be nothing more than a claim for contribution and indemnity by another name and, therefore, would be prohibited by the clauses in the Settlement Agreement.

59 I do not necessarily accept this characterization of the potential claim of the Non-Settling Defendants. In my view, however, the thrust of the submissions of the plaintiffs and the Settling Defendants with respect to the effect of the provisions of the Settlement Agreement is correct. The

Non-Settling Defendants cannot successfully assert a claim in damages against any party based upon their own negligence, no matter how such a claim is characterized, because of s. 3 of the Negligence Act. It provides:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

In the result, in any claim against the Settling Defendants, any damages of the Non-Settling Defendants attributable to their own negligence cannot be recovered.

60 On the other hand, damages which have been incurred by the Non-Settling Defendants independent of any liability to the plaintiffs in a concurrent tort can be pursued and are not foreclosed by the contested provisions of the settlement agreement. The clarity note appended to clause 13(e) of the agreement speaks to this.

61 For these reasons, I do not find that there is any substantive prejudice caused to the Non-Settling Defendants by the contested provisions, nor is there any deprivation of any protections conferred upon them by the Negligence Act.

62 I turn next to the Non-Settling Defendants' contention that the contested provisions will prejudice them on a procedural level. In support of this contention, the Non-Settling Defendants rely on a decision of the British Columbia Court of Appeal in British Columbia Ferry Corp. v. T & N plc, [1996] 4 W.W.R. 161 (B.C.C.A.). Although they rely on this case in support of their assertion of procedural prejudice, I observe that the decision supports the above reasons insofar as the allegation of substantive prejudice is concerned.

63 In the B.C. Ferry case, the plaintiffs had sued a group of asbestos manufacturers. The manufacturers sought to add the installers of the asbestos to the action by way of third party proceedings. The plaintiffs entered into agreements with several of the third parties, in which the plaintiffs agreed that they would not seek to recover from the manufacturers any portion of the damages which a court attributed to the fault of the third parties.

64 The manufacturers sought contribution and indemnity from the third parties, and in addition, damages for the out of pocket expenses incurred in defending the plaintiffs' claim as well as a declaration as to the degree of fault, if any attributable to each third party. The third parties, in a series of proceedings, moved successfully for dismissal of all of the claims against them.

65 On appeal the Court upheld the dismissal of the claim in contribution and indemnity, on the basis that the agreement between the plaintiffs and the third parties saved the defendants "harmless from any damages caused or contributed to by the fault of the concurrent tortfeasor", thus eliminating any "basis upon which the right to contribution or indemnity, ... could be exercised." In addition, the dismissal of the claim in damages for out of pocket expenses for defending the plaintiffs' claim was upheld. The Court found that the trial judge had correctly determined that there was no duty of care existing between the defendants and the third parties such that the claim could be asserted.

66 However, the appeal in respect of the claim for declaratory relief was allowed because of considerations of fairness to the defendants. Wood J.A. stated at 175-6:

> It would, in my view, be manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue. But that is precisely what will occur here if the defendants are denied the declaratory relief they seek ... In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed.

67 In respect of submissions that declaratory relief could not issue because there was no lis between the parties, Wood J.A. stated at 175:

> While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact that it is needed only for such purpose.
>
> ...
>
> One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the Guaranty Trust Company of New York case.

68 The agreement at issue in the B.C. Ferry case was much the same in effect as the provisions of the agreement between the plaintiffs and the Settling Defendants at issue here. However, the Court of Appeal was able to address the issue of procedural prejudice, without negating the agreement, in such a manner so that the fairness to the defendants was not compromised. Although, the decision is not binding on this court, it provides an enlightened guide in the current context.

69 The procedural objection raised by the Non-Settling Defendants brings to bear the requirement of balancing the interests of the plaintiff class, on the one hand and the defendants, on the other, in a complex class proceeding. The objects of the Class Proceedings Act must be met without prejudice to either the plaintiff class or the defendants.

70 However, the settlement of complex litigation is encouraged by the courts and favoured by public policy. Indeed, according to Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 (H.C.J.) at 230-31:

> ... the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.

71 In consideration of the interests which must be balanced, it is my view that the procedural objections raised by the Non-Settling Defendants can be addressed without a wholesale rejection of the proposed Settlement Agreement.

72 This Court has pointed out in Carom v. Bre-X Minerals Ltd., [1999] O.J. No. 281 (Gen. Div.), in another context, that "the CPA is a procedural statute replete with provisions guaranteeing order and fairness".

73 The Class Proceedings Act is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.

74 The settlement before this court meets the underlying objective of the Act. There is no objection to its terms, save for the prohibitive provisions. However, if these provisions are not approved, the entire settlement will fail. This will seriously prejudice the plaintiff class in terms of delay and costs of litigation and further, expose the plaintiffs to the risks of litigation. Conversely, to ignore the procedural concerns advanced by the Non-Settling Defendants would unfairly prejudice those parties.

75 The Class Proceedings Act is sui generis legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here, the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.

76 Accordingly, I am prepared to grant judgment on the basis of the Settlement Agreement, subject to terms I set out below. The prohibitive provisions will be entered as a "stay of proceedings", as against the Settling Defendants under s. 13 of the Act, subject to compliance by the Settling Defendants with the following terms as they relate to the conduct of the remaining portions of the action.

77 These terms generally described, are that the Non-Settling Defendants may, on motion to this court, obtain:

(1) documentary discovery and an Affidavit of Documents in accordance with the Rules of Civil Procedure from each of the Settling Defendants;
(2) oral discovery of a representative of each of the Settling Defendants, the transcript of which may be read in at trial;
(3) leave to serve a Request to Admit on each Settling Defendant in respect of factual matters;
(4) an undertaking to produce a representative to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

78 In addition, the fact of the settlement, but not the terms thereof, shall be disclosed to the trial judge at the commencement of trial.

79 Furthermore, pursuant to its case management powers under the Act, this court shall maintain an ongoing supervisory role in this action. In the event that any Settling Defendant fails to comply with an order of this court made pursuant to the above terms, the court may, in addressing any such failure, lift the stay of proceedings in respect of that defendant.

Certification

80 The next consideration is whether the proceeding against the Settling Defendants meets the requirements for certification as a class proceeding. The elements of the test for certification are set out in s. 5 of the Class Proceedings Act.

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

(i) Cause of Action

81 The Statement of Claim discloses a cause of action. The plaintiffs claim damages against the Settling Defendants arising from, inter alia, their negligent design, manufacture, and failure to establish appropriate and safe standards relating to the Heating Systems, as well as breaches of statutory duties, warranties and representations, and negligent misrepresentations. The plaintiffs also claim that these Defendants failed: to warn the public of the potential safety hazard presented by the defective product; to report these defects to the Ministry of Consumer and Commercial Relations; and to recall the defective and dangerous product.

(ii) Identifiable Class

82 The Plaintiffs propose that upon certification, the Class be defined as

> ONHWP and all persons or entities in the Province of Ontario, Canada who have incurred or will incur remediation expenses as a result of owning a natural gas or propane fired appliance installed with high-temperature plastic venting under the trade names PLEXVENT, ULTRAVENT or SELVENT (manufactured or sold by Chevron, Hart&Cooley and Eljer Manufacturing respectively).

This class definition meets the second element of the test for certification.

(iii) Common Issue

83 The plaintiffs propose that the common issue for the class be defined as:

> What claims does the Settlement Class have arising from the Ministry of Consumer and Commercial Relations Director's Safety Order dated September 12, 1995.

The common issue proposed satisfies the third criterion of the certification requirements.

iv) Preferable Procedure

84 A class proceeding is the preferable procedure for the resolution of the common issue as outlined above. The aggregate claims of the Class are substantial but individually, these claims cannot be litigated economically. On a practical basis, should certification be denied, the result would be to deny access to the Courts for many of the claims not covered by ONHWP. In addition to being expensive to litigate on an individual basis, the effect of multiple claims of this nature coming forward would place a heavy burden on judicial resources. In this case, a class proceeding is the preferable procedure for providing members of the Class with access to an effective remedy.

(v) Representative Plaintiff

85 Kathy Adetuyi and Andrew Duke are individuals who purchased heating systems with HTPV installed in conjunction with mid-efficiency appliances. Kathy Adetuyi's home was not enrolled in the ONHWP program and she bore the entire cost of complying with the Director's Safety Order. Andrew Duke's home was covered by ONHWP. As such, a portion of his cost to the correct the defective heating system was borne by ONHWP.

86 Kathy Adetuyi, Andrew Duke, and ONHWP are all prepared to act as representative Plaintiffs for the Class. Collectively, their actions indicate that they have fairly represented the class, and there is no evidence that they will not continue to do so. These proposed representative plaintiffs do not have interests which conflict with the interests of other Class Members and the Settlement Agreement provides a plan for the resolution of this proceeding. The proposed representative plaintiffs are acceptable to the court, thus meeting the final requirement for certification.

87 Accordingly, all of the requirements of the Act regarding certification are met.

Settlement Approval

88 Finally, I turn to the settlement. For a settlement to be approved it must be fair, reasonable and in the best interests of the Class, and, as stated in Dabbs, will generally take into account factors such as:

1. Likelihood of recovery or likelihood of success;
2. Amount and nature of discovery, evidence or investigation;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties, if any;
7. Number of objectors and nature of objections; and
8. The presence of arms-length bargaining and the absence of collusion.

89 The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of

reasonableness. The range of reasonableness has been described by Sharpe J. in Dabbs as follows at 440:

> [All] settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.

90 Furthermore, the recommendation of class counsel is a factor to be considered, though the potential for conflict must also be noted. Sharpe J. stated at 440:

> The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a Significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

91 In Ontario, the courts have also recognized that the practical value of an expedited recovery is a significant factor for consideration. In Dabbs, Sharpe J. determined that in addition to the legal and factual risks, a practical concern favouring settlement includes the potential that the case would take several years to reach trial and exhaust all appeals.

92 Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants. See Newberg on Class Actions (Shepard's/McGraw-Hill 3d ed 1992) ss. 11.45-46.

93 In the case at bar, the settlement proposed provides compensation to class members through a settlement mechanism that allows partial recovery for the damages of the class. I am satisfied that significant research and investigation was conducted in this matter prior to issuance of the statement of claim. Settlement negotiations between the settling parties have been ongoing since early 1996. These negotiations have been adversarial and protracted. The plaintiffs have been guided in their settlement negotiations by an understanding of the risks associated with the litigation, the potential future expense and the recommendation and experience of their counsel. Further, the terms of the settlement were arrived at as a result of intensive mediation conducted by an experienced arbitrator with specific knowledge of the factual background. The settlement benefits to the plaintiff class are well within the range of reasonableness.

94 In conclusion, I find that the settlement is fair and reasonable and in the best interests of the class as a whole.

Disposition

95 This action represents the quintessential class proceeding. It involves a single purpose product which is alleged to be defective. This core element of commonality is such that a determination of liability to the representative plaintiffs would be determinative of liability to the entire class. As stated in Chace v. Crane Canada Inc. (1997), 14 C.P.C. (4th) 197 (B.C.C.A.) at 202:

> This court recently observed that in a product liability case a determination that the product in question is defective or dangerous as alleged will advance the claims to an appreciable extent ... I agree with the chambers judge that is the situation here. The respondents are alleging an inherent defect ... This seems exactly the type of question for which a class action is ideally suited and remarkably similar to that concerning faulty heart pacemaker leads that was certified by the Ontario Court (General Division) in Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331. (Citations omitted).

96 This product's liability claim involves thousands of relatively small, nearly identical claims. In the absence of certification as a class proceeding, they would not present viable individual lawsuits because of the costs of litigation. Cost barriers to litigation impact on both access to justice and behavioural modification, two of the goals of the Act. Taken together with the nature of the claim and the element of commonality, the case cries out for certification. The motion for certification against the Settling Defendants is granted.

97 The Settlement Agreement taken as a whole is fair and reasonable and in the interests of the class members. It brings a significant degree of resolution to a protracted proceeding although the Non-Settling Defendants have raised some legitimate concerns about the prohibitive provisions, in light of the procedural protections available through the Class Proceedings Act, the Rules of Civil Procedure and the terms attached to the stay granted in these reasons, these procedural concerns can be addressed without rejecting the settlement. Accordingly, the settlement is approved in its entirety, subject to the terms set out above.

98 The motion raises a novel point of law and the result is divided. There shall be no order as to costs. I may be spoken to in respect of any other matters arising out of these reasons.

WINKLER J.

cp/s/bbd

Tab 2

Case Name:

Airia Brands Inc. v. Air Canada

Between
Airia Brands Inc., Startech.com Ltd., and QCS-Quick Cargo Service GMBH, Plaintiffs, and
Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Airlines Co. Ltd., Cargolux Airline International, Lan Airlines S.A., Lan Cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo Pte Ltd., Swiss International Airlines Ltd., Qantas Airways Limited, and Martinair Holland N.V., Defendants

[2011] O.J. No. 4787

2011 ONSC 6286

Court File No. 48161

Ontario Superior Court of Justice

L.C. Leitch J.

Heard: October 13, 2011; written submissions, October 17, 2011 by the defendants Qantas, Scandinavian, Singapore and Cargolux.
Judgment: October 26, 2011.

(65 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Settlements -- Approval -- Motion by plaintiffs certifying class action for settlement purposes and approval of settlements allowed -- Plaintiffs alleged defendants conspired to fix air freight shipping prices -- Consent certification orders granted, as requirements for certification were met -- Class proceeding was preferable procedure, adequate representative plaintiffs existed and settlement

agreements set out workable resolution -- Settlements were fair, reasonable and in best interests of class in light of procedural and litigation risks -- Amounts paid reflected significant portion of fuel surcharges imposed on air freight shipping services -- Proposed form of bar order was appropriate and preserved rights of non-settling defendants.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Ontario Rules of Civil Procedure, Rule 21

Counsel:

Charles M. Wright, Linda Visser, and Kerry McGladdery Dent for the Plaintiffs.

Katherine Kay, for the defendants Air Canada and AC Cargo Limited Partnership.

Jeffrey Feiner, for the defendant Cathay Pacific Airways Ltd.

Aaron Dantowitz, for the defendants Atlas Air Worldwide Holdings Inc. and Polar Air Cargo Inc.

Adam S. Goodman, for the defendant Korean Airlines Co. Ltd.

Lisa Parliament, for the defendant Société Air France and Koninklijke Luchtvaart Maatschappij N.V. dba KLM.

Randy Sutton, for the defendant LAN Airlines S.A., LAN Cargo.

S.A. Vera Toppings, for the defendant Asiana Airlines Inc.

Denes Rothschild, for the defendant British Airways PLC.

Christopher Naudic for the defendants, Singapore Airlines Ltd.
and Singapore Airlines Cargo Pte Ltd. ("Singapore").

David Quayat, for the defendant, Cargolux Airline International ("Cargolux").

Jason Wadden, for the defendant, Scandinavian Airlines System ("SAS").

Margaret Waddell, for the defendant Qantas Airways Limited, ("Qantas").

REASONS FOR JUDGMENT

RE: Consent Certification and Settlement Approval with SAS, Qantas, Cargolux and Singapore

1 L.C. LEITCH J.:-- The plaintiffs move for an order certifying this action as a class proceeding for settlement purposes and approval of four settlement agreements described below. This action was commenced by Statement of Claim issued May 12, 2006, and subsequently amended. In particular, the Statement of Claim was amended on June 13, 2008, to add Startech.com Ltd. as a plaintiff. Leave was granted on May 19, 2009, to file a third Fresh as Amended Statement of Claim to substitute the

plaintiff Nutech Brands Inc. with Airia Brands Inc. and add the plaintiff QCS-Quick Cargo Service Gmbh.

2 Leave was granted on May 18, 2011, to file a fourth Fresh as Amended Statement of Claim to add Qantas Airways Limited and Martinair Holland N.V. as defendants without prejudice to any position, objection or defence such defendants may take or assert with respect to the fourth Fresh as Amended Statement of Claim.

3 The plaintiffs settled this action with Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Airlines Ltd. (collectively referred to as "Lufthansa") pursuant to an agreement entered into on December 30, 2006, (the "Lufthansa settlement agreement"). The settlement was approved by the Court on February 19, 2009.

4 After the settlement with Lufthansa, the plaintiffs settled the action with Japan Airlines International Co., Ltd. ("JAL") pursuant to a settlement agreement dated July 8, 2010 (the "JAL settlement agreement"). The JAL settlement agreement was approved by Campbell J. who supervised proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 relating to JAL.

5 The plaintiffs entered into a settlement agreement with Scandinavian Airlines System ("SAS") on November 26, 2010 (the "SAS settlement agreement").

6 Thereafter the plaintiffs entered into a settlement agreement with Qantas Airways Limited ("Qantas") on May 6, 2011 (the "Qantas settlement agreement"). As noted above, Qantas was not originally a named defendant in this action and it was added as a defendant to facilitate the settlement,

7 In addition, the plaintiffs entered into a settlement agreement with Cargolux Airline International ("Cargolux") on May 10, 2011 (the "Cargolux settlement agreement").

8 Finally, the plaintiffs entered into a settlement agreement with Singapore Airlines Ltd., Singapore Airlines Cargo PTE Ltd. (collectively referred to as "Singapore") on June 24, 2011 (the "Singapore settlement agreement").

9 All of the settlement agreements are subject to court approval in Ontario, British Columbia and Quebec.

Consent Certification

10 SAS, Qantas, Cargolux and Singapore have consented to certification solely for settlement purposes. It is clear from the case law that the certification requirements under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 are not as rigorously applied in a settlement context where certification is consented to for settlement purposes.

11 I am satisfied that the requirements of s. 5 of the *Class Proceedings Act* are met on this motion and this action should be certified for settlement purposes with SAS, Qantas, Cargolux and Singapore.

12 For reasons given for the order for the consent certification relating to the Lufthansa settlement, I find that the plaintiffs have satisfied the Rule 21 test and that the Statement of Claim discloses a cause of action.

13 Again, for the reasons given in relation to the Lufthansa certification order, I find that there is an identifiable class defined as follows:

> All Persons, other than members of the Quebec Settlement Class or the B.C. Settlement Class, who purchased Air Freight Shipping Services during the Settlement Class Period, including those Persons who purchased Air Freight Shipping Services through freight forwarders or from any air cargo carrier, including without limitation, the Defendants, and specifically including the [SAS, Quantas, Cargolux and Singapore Defendants]. Excluded from the Ontario Settlement Class are the Defendants and their respective parents, employees, subsidiaries, affiliates, officers and directors, and Persons who validly and timely opted out of the Ontario Action in accordance with the order of the Ontario Court dated March 6, 2008.
>
> Air Freight Shipping Services means air freight cargo shipping services for shipments within, to, or from Canada, but specifically excluding air freight cargo shipping services for shipments to or from the United States.

14 In respect of the Qantas order, the Settlement Class will exclude persons who fall within the parameters of the Australian Class Action which is ongoing in Australia where Qantas' head office is located and I approve the additional exclusion contained in the form of order presented by counsel.

15 The Settlement Classes for these consent certification orders are substantially the same as the class approved for the Lufthansa and JAL settlements.

16 I find, for the reasons given in relation to the Lufthansa settlement, that the following common issue is identified, which is substantially the same as that approved in respect of the Lufthansa and JAL settlements.

> Did [SAS, Quantas, Cargolux and Singapore] conspire to fix, raise, maintain or stabilize the prices of, Air Freight Shipping Services during the Class Period [or Purchase Period] in violation of Part VI of the *Competition Act* and the common law? If so, what damages, if any did, Settlement Class Members suffer?

17 Finally, for the reasons given in relation to the Lufthansa order, I find that a class proceeding is the preferable procedure; there are adequate representative plaintiffs and the settlement agreements set out a workable method of resolving the proceeding.

18 Accordingly, consent certification orders shall go in the form presented by the plaintiffs in relation to the settlement with each of SAS, Qantas, Cargolux and Singapore.

Notice of the Certification and Settlement Approval Hearing

19 The notice programme implemented in respect of the Lufthansa settlement informed putative Class Members of their rights to opt out of this action and that no further right to opt out would be provided.

20 With respect to the notice relating to the hearing of these motions, an order was made August 2, 2011, respecting the notice of the Certification and Settlement Approval Hearing. The notice contained a date by which Settlement Class Members could object to the proposed settlements. The deadline for such objections was October 3, 2011, and no objections have been received.

Summary of the Settlement with SAS

21 As class counsel advised, the settlements with SAS and Qantas have the same rationale and outcome.

22 Pursuant to the SAS settlement, SAS will pay $300,000 Canadian for the benefit of settlement class members. In assessing this amount, it is significant that SAS did not operate any flights into or out of Canada during the relevant period. SAS's shipments between Canada and other countries were routed through the United States. As outlined in the materials in support of the settlement approval motion, given the small size of SAS's commerce to and from Canada during the relevant period, a primary objective for class counsel in negotiating the settlement with SAS was receiving cooperation in the continued prosecution of the litigation. The terms of that cooperation are outlined more fully in the materials filed on the motion.

23 The amount being paid by SAS reflects a significant portion of the fuel surcharges imposed on Airfreight Shipping Services

Summary of the Settlement with Qantas

24 As noted above, the rationale behind the settlement with Qantas according to plaintiffs' counsel was very similar to that respecting the settlement with SAS. Both Qantas and SAS were very minor participants in the Canadian air cargo market. However, the plaintiffs have claimed damages on a joint and several basis, thus all defendants are exposed for joint and several liability. Qantas has agreed to pay $$237,000 for the benefit of Settlement Class Members, which represents approximately the total fuel surcharges imposed by Qantas on Air Freight Shipping Services during the relevant period.

25 For reasons outlined in the materials filed on the motion respecting the degree of involvement of Qantas in the alleged conspiracy, and the fact that Qantas is discharging the full value of relevant fuel surcharges, while Qantas has agreed to provide cooperation to the plaintiffs in the continued prosecution of the litigation, its obligations are less onerous than those of the other settled and settling defendants.

Summary of the Settlement with Cargolux

26 Class counsel advised that the settlements with Cargolux and Singapore have the same settlement dynamics. However, only Cargolux has pleaded guilty in Canada and settled the U.S. litigation whereas Singapore is defending the U.S. litigation and has not pled guilty. In relation to the Cargolux settlement, class counsel had access to the numbers utilized in relation to the U.S. settlement and had the precedent of the U.S. settlement available to them.

27 Cargolux has agreed to pay $1,800,000 Canadian for the benefit of Settlement Class Members.

28 Cargolux will also provide substantial cooperation to the plaintiffs in the continued prosecution of the litigation.

29 As set out in the affidavit filed on the motion from class counsel's perspective, the Cargolux settlement is intended to roughly equate to the Cargolux settlement in the United States, plus a contribution to notice and administration costs. The Singapore settlement similarly is intended to roughly equate to the Cargolux settlement.

30 As class counsel noted, these are similar settlements at similar stages to the U.S. settlement.

Summary of Settlement with Singapore

31 As class counsel set out, the position of Singapore was different to Cargolux in two material respects. Firstly, in contrast to Cargolux, Singapore has not pled guilty to any offence in Canada and secondly, it has not entered into any settlement of a class proceeding in the United States.

32 Pursuant to the plaintiffs' settlement with Singapore, Singapore has agreed to pay $1,050,000 Canadian of which up to $250,000 Canadian is allocated towards Singapore's proportionate share of administration and notice costs without refund should such costs be less. It is now known that the costs were significantly less - $46,638.34 - with the result that the additional amount is added to the settlement amount to be distributed to Settlement Class Members.

33 Class counsel had access to the fuel and security surcharges during the relevant period and class counsel were satisfied that the Singapore settlement roughly reflects the relative terms of the Cargolux settlement in the United States with appropriate accommodation for Singapore's particular circumstances in Canada. In particular, that Singapore was a smaller defendant in this matter and had a smaller volume of commerce relative to Cargolux in Canada during the class period.

34 Singapore also will provide cooperation to the plaintiffs in the continued prosecution of the litigation but such cooperation will be delayed until after the delivery of the relevant documents or information in the U.S. litigation.

Assessment of the Settlements with SAS, Qantas, Cargolux and Singapore

(i) The Relevant Case Law

35 As outlined in the reasons respecting approval of the Lufthansa settlement, in *Dabbs v. Sun Life Assurance of Canada*, [1998] O.J. No. 1598 (Gen. Div.) [*Dabbs*], Sharpe J. provided a procedural framework for hearing a motion for approval of a settlement in a class proceeding. While Sharpe J. indicated that his ruling was intended to provide guidance to the parties and objectors in that case, the factors he outlined and his statement of the overall test for approval (that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it) have been endorsed by many other courts on settlement approval motions (see *Parsons v. Canadian Red Cross* Society (1999), 40 C.P.C. (4th) 151 [*Parsons*]; *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93 (S.C.J.) [*Nunes*]; *Ford v. F. Hoffman - La Roche Ltd.* (2005), 74 O.R. (3d) 758 [*Ford*]).

36 At para. 13 of *Dabbs,* Sharpe J. endorsed the following criteria listed in *Newberg on Class Actions,* 3rd ed. (Shepherd's/McGraw Hill, 1992) at para. 11.43:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery evidence
3. Settlement terms and conditions
4. Recommendation, and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties, if any
7. Number of objectors and nature of objections
8. The presence of good faith and the absence of collusion

37 In *Parsons,* Winkler J. (as he then was) at para. 72, sets out two additional factors which may be considered in the settlement approval process:

i) The degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and
ii) Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

38 In *Nunes,* Cullity J. provided a very helpful summary of the principles to be applied on a motion for settlement approval. As he noted, the party seeking approval has the burden of satisfying the court that the settlement should be approved. The court must be satisfied that the proposed settlement is fair, reasonable and in the best interests of the class. The court does not simply rubber-stamp a proposal, but it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. As Cullity J. described it at para. 7, in order to reject a proposed settlement "and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness." As he continued, courts encourage "resolution of complex litigation through the compromise of claims" and such an approach is also "favoured by public policy." It is fair to say, as he noted, that a proposed settlement "negotiated at arm's-length by class counsel" has "a strong initial presumption of fairness." Finally, while he noted that the settlement must provide "appropriate consideration" to the class for the release of its rights in the litigation, it must be recognized "that there may be a number of possible outcomes within a zone or range of reasonableness; all settlements are the product of compromise" and in a settlement parties rarely receive "exactly what they want." Therefore, "fairness is not a standard of perfection" and "reasonableness allows for a range of possible resolutions." As he noted "a less than perfect settlement may be in the best interests of those affected ... when compared to the alternative of the risks and costs obligation."

39 It is appropriate to consider non-monetary benefits in the assessment of the reasonableness of a settlement agreement (*Irving Paper Limited et al v. Atofina Chemicals Inc. et al* (October 15, 2008), London 47025 (Ont. S.C.), at para. 26; *Crosslink Technology, Inc. v. BASF Canada et al* (November 30, 2007), London, 50305CP (Ont. S.C.) at para. 22 (citing *Rideout v. Health Labrador Corp.,* [2007] N.J. No. 292 (S.C.T.D.); and *Ford*).

40 The non-monetary benefit from a settlement was also acknowledged in *In re Linerboard Antitrust litigation,* 292 F. Supp. 2d 631 (E.D. Pa. 2003), and *In re Corrugated Container Antitrust Litigation,* 1981 WL 2093 (S.D. Tex.) [*Corrugated Container*]

41 Since February 2009, when the Lufthansa settlement was considered, the above-noted factors have been consistently applied in considering approvals of settlements (see for example, *Osmun v. Cadbury, Adams, Canada Inc.*, [2010] O.J. No. 1877(S.C) at para. 33).

42 I am satisfied that the settlements with SAS, Qantas, Cargolux and Singapore are fair, reasonable and in the best interests of the Settlement Class for the following reasons.

43 As noted in the context of the Lufthansa settlement, the recommendations from experienced class counsel are given considerable weight. Class counsel recommends approval of these proposed settlements as being fair, reasonable and in the best interests of the Settlement Class noting that they will result in significant monetary compensation for Settlement Class Members as well as providing the non-monetary benefit of substantial cooperation in the continued litigation.

44 The procedural and litigation risks in relation to this action, as outlined in Ms. DeKay's affidavits filed in support of these motions, were considered by class counsel in recommending approval of the proposed settlements.

45 No formal discovery has yet taken place, however, class counsel have advised that they have had significant information available to them to evaluate the merits of these settlements including the terms of previous settlements in Canada and the United States; the financial circumstances of each of the settling defendants; the amount of the revenues and fuel surcharges obtained by the settling defendants during the relevant period; the sales information provided during negotiations; industry information and reports and information provided by Lufthansa pursuant to the Lufthansa settlement agreement, and, the guilty pleas and findings in Canada, the United States, Europe and elsewhere.

46 As with the Lufthansa settlement, these settlements resulted from extensive arms length negotiations and again to repeat the words used by Cullity J. in *Nunes* as I referred to in relation to the Lufthansa settlement, the proposed settlements have "a strong initial presumption of fairness".

47 Further, there are no objections which speak to the reasonableness of the settlements.

48 Again, as I did in relation to the Lufthansa settlement, I accept the submission of class counsel that the distribution of the settlement amounts will be very expensive and it is in the best interests of the class to wait for a distribution plan to be approved as the litigation progresses. It is anticipated, that a distribution will be made in the near future.

49 The deposit of the settlement funds with an escrow agent for the benefit of the class pending approval of the settlements and now pending distribution to the class will add value to the settlements considering the interest that will accrue on those funds.

(ii) The Bar Order

50 As was the case in relation to the Lufthansa settlement, the settlements with SAS, Qantas, Cargolux and Singapore contain a bar order which, if granted, will bar all claims for contribution and indemnity against each of SAS, Qantas, Cargolux and Singapore (excluding claims made by persons who have opted out of the settlement).

51 The plaintiffs, Lufthansa and the non-settling defendants, agreed on the terms of the bar order contained in the Lufthansa settlement approval order.

52 The non-settling defendants who have the right to make submissions to the court concerning a proposed bar order, took no issue with the provisions of the bar order itself which paralleled the bar order in the Lufthansa settlement. However, there was a contentious issue with respect to paragraph 21 of the proposed form of order in relation to the SAS, Cargolux and Singapore settlement approval orders and paragraph 20 of the Qantas settlement approval order.

53 The Lufthansa order provided the non-settling defendants with the absolute right to documentary and oral discovery and to serve a request to admit against Lufthansa. These proposed forms of settlement orders do not provide the non-settling defendants with a *de facto* entitlement to such relief but require them to bring a motion in advance.

54 The non-settling defendants objected to the form of bar order sought by SAS, Qantas, Cargolux and Singapore.

55 The Lufthansa order provided the non-settling defendants with the right to seek documentary and oral discovery and to serve a request to admit without the necessity of a motion before the court and a motion was only required to seek an order requiring a Lufthansa representative to testify at trial and be subject to cross-examination by the non-settling party. In the contentious paragraphs in the SAS, Cargolux, Singapore and Qantas settlement approval orders, the non-settling defendants' right

to pursue documentary and oral discovery and to serve a request to admit requires a motion to the court to be brought on at least ten days' notice which is to be determined as if SAS, Cargolux and Singapore are parties to the action. The contentious paragraph in the Qantas settlement approval order contains the same requirement for a motion, however, such motion is to be on 30 days' notice and there is no inclusion of the phrase "determined as if Qantas were a party to the action".

56 The subsequent paragraphs in the SAS, Qantas, Cargolux and Singapore settlement approval orders provide that the settling defendant retains all rights to oppose the motions by the non-settling defendants and, on any motion brought, the court may make such orders as to costs and other terms as it considers appropriate. The orders also provide that a non-settling defendant may affect service of the motions on the settling defendant by service on counsel of record in the action.

57 I agree with counsel for the settling defendants that it is significant that the Lufthansa bar order was made before the most recent amendments to the rules which incorporate the concept of proportionality into all exercises of discretion and interpretation of the rules.

58 As counsel submits, the proposed form of order is reasonable, appropriate and reflects a proportionate balancing of the interest of the settling defendants and the discovery interests of non-settling defendants. The requirement of the non-settling defendant to bring a motion on ten days' notice provides the settling defendants with a mechanism to ensure that any discovery requests are proportionate and consistent with the terms of the settlement agreement.

59 Counsel for the settling defendants also point out that the proposed form of wording in their orders is identical to the wording approved in the *Osman* decision, which I am advised is the most recent decision in respect of bar orders. They also note that similar forms of orders were approved in *Gariepy v. Shell Oil Company et al* (2002), 26 C.P.C. (5th) 358 (S.C.) and *Crosslink, supra.*

60 Indeed, as pointed out by counsel for the settling defendants, in *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.) in what I agree is the seminal case in Ontario regarding the balancing of interests between settling and non-settling defendants through the use of bar orders, Justice Winkler, (as he then was) outlined information that non-settling defendants might be able to obtain on motion to the court. Clearly, in my view, he contemplated that such information would be available by motion and subject to the court's supervision. The fact that it was otherwise agreed to in respect of a Lufthansa settlement does not detract from the fact that the consistent view of the court where this issue has been considered is that the non-settling defendants have no *de facto* rights but must satisfy the court on motion that the discovery they seek is reasonable and appropriate.

61 Furthermore, as counsel for the non-settling defendants noted, by virtue of the terms of the bar order there is no longer any cause of action between the settling defendants and the non-settling defendants thereby diminishing any potential need to obtain documentary or oral discovery from the settling defendants. In addition, because of the obligations of each settling defendant to cooperate with the plaintiffs pursuant to the terms of the settlement agreement, any documents or information obtained by the plaintiffs will be discoverable by the non-settling defendants with the result that limited, if any, discovery of the settling defendants will be necessary by the non-settling defendants.

62 Accordingly, I agree with counsel for the settling defendants that the proposed form of order balances the rights of the non-settling defendants and the settling defendants. It preserves the non-settling defendants' rights to seek an order for documents or discovery from the settling defendants, if necessary, while ensuring that the settling defendants are not disproportionately exposed

to undue burden and expense in respect of discovery related matters in an action which they have settled to avoid further expense of litigation and to achieve a final resolution of the claims asserted against them.

63 There are unique issues raised relating to Qantas. Qantas was not a party to the proceeding and, as a result, Qantas submits that the non-settling defendants are not losing any procedural entitlement as against Qantas that was otherwise in place. It is important that Qantas did not oppose being added as a party to the action for the purposes of facilitating court approval of the settlement agreement but it expressly reserved its right to assert any defence or challenges that it might have in respect of the actions. It is specifically stated in the Qantas settlement agreement that in addition to making no admissions of liability, it entered into the settlement agreement to avoid the further expense, inconvenience and burden of these actions and agreed to pay approximately all of the total fuel surcharges it imposed on Air Freight Shipping Services during the class period in order to achieve full and final resolutions with the plaintiffs and "put to rest this controversy."

64 I agree with counsel for Qantas that these facts set the Qantas settlement apart and distinguish it from the other settlements being considered on this motion and other cases in which bar orders have been considered and approved. I agree with Qantas that it is not fair and reasonable to allow the non-settling defendants to assert any type of discovery rights against Qantas pursuant to the settlement approval order as if Qantas remained a party to the action.

65 Accordingly, I approve the proposed form of order respecting the Qantas settlement as presented by counsel.

L.C. LEITCH J.

cp/e/qlafr/qlvxw

Tab 3

Case Name:

Canadian Airlines Corp. (Re)

IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs, and
Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., defendants

[2000] A.J. No. 1692

19 C.B.R. (4th) 1

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

Application by holders of senior secured notes in corporation for order lifting stay of proceedings against them in Companies' Creditors Arrangement Act proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Counsel:

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q. C., and H.M. Kay, Q. C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C, and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

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1 **PAPERNY J.** (orally):-- Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAC") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of

the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and-they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, Meridian Development Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in Re Alberta-Pacific Terminals Ltd (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.). Thackray J. comments that the maintenance of the

status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
> (6) The court has a broad discretion to apply these principles to the facts of the particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization:

> Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Oat. CA.) at 115, as just one of several cases supporting this proposition. Re Philip's Manufacturing Ltd. (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, in-

> cluding the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Re-gional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would he in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a re-ceiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CALL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: Meridian Development Mc. v. Toronto Dominion Bank, supra, and Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (NS.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C.S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The

> threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and en-danger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

PAPERNY J.

cp/s/qw/qlmmm

Tab 4

Case Name:

Stelco Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A"*
[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2005] O.J. No. 1171

75 O.R. (3d) 5

253 D.L.R. (4th) 109

196 O.A.C. 142

2 B.L.R. (4th) 238

9 C.B.R. (5th) 135

138 A.C.W.S. (3d) 222

2005 CarswellOnt 1188

2005 CanLII 8671

Docket: M32289

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, K.N. Feldman and R.A. Blair JJ.A.

Heard: March 18, 2005.

Judgment: March 31, 2005.

(79 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Superior courts -- Inherent jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Appointment or election -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Business judgment rule -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Insolvency law -- Proposals -- Court approval -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Administrative law -- Natural justice -- Reasonable apprehension of bias -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Application by two former directors of Stelco for leave to appeal and appeal from the order of their removal from the board of directors. Stelco was engaged in an extensive economic restructuring while under statutory insolvency protection that involved court-appointed capital raising via a competitive bid process. The appellants were involved with two companies that purchased approximately 20 per cent of Stelco's publicly traded shares during the protection period and were subsequently appointed to its board of directors to fill vacancies caused by resignations. As part of the appointment process, the appellants were informed of their fiduciary duties and agreed that their companies would have no further involvement in the competitive bid process. Stelco's employees sought the appellants' removal from the board on the basis that the participation of two major shareholder representatives would tilt the evaluation of the bids in favour of maximizing shareholder value at the expense of bids more favourable to the interests of the employees. The motions judge held that the involvement of the appellants on the board raised an unnecessary risk that their future conduct potentially jeopardized the integrity and neutrality of the capital raising process, and declared the appointments to be of no force

and effect. The judge cited the inherent jurisdiction of the court as the basis for the order. The appellants submitted that the judge had no jurisdiction to make a removal order, and in the alternative, he erred in applying a reasonable bias test to the removal of directors. The appellants further submitted that the judge erred by interfering with the board's exercise of business judgment, and that the facts did not justify the removal order.

HELD: Application for leave and appeal allowed. The judge misconstrued his authority, and made an order that he was not empowered to make. The court had no statutory or inherent authority to interfere with the composition of the board of directors. The judge erred in declining to give effect to the business judgment rule, and was not entitled to usurp the role of the directors and management in conducting the company's restructuring efforts. The record did not support a finding that there was sufficient risk of misconduct to warrant a conclusion of oppression, nor was the level of such risk assessed. There was no statutory principle that envisaged screening the neutrality of the appellants in advance of their appointment to the board of Stelco. Legal remedies were available to the employees of Stelco in the event that the appellants engaged in conduct that breached their legal obligations to the corporation. The applicability of such remedies was dependent on actual misconduct rather than mere speculation. Therefore, an apprehension of bias approach was not appropriate in the corporate law context.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act ss. 1, 102, 106(3), 109(1), 111, 122(1)(a), 122(1)(b), 145, 145(2)(b), 241, 241(3)(e)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 As Amended, ss. 11, 11(1), 11(3), 11(4), 11(6), 20

Appeal From:

Application for Leave to Appeal, and if leave be granted, an appeal from the order of Farley J. dated February 25, 2005 removing the applicants as directors of Stelco Inc., reported at: [2005] O.J. No. 729.

Counsel:

Jeffrey S. Leon and Richard B. Swan, for the appellants, Michael Woollcombe and Roland Keiper

Kenneth T. Rosenberg and Robert A. Centa, for the respondent United Steelworkers of America

Murray Gold and Andrew J. Hatnay, for the respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. and Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782

John R. Varley, for the Active Salaried Employee Representative

Michael Barrack, for Stelco Inc.

Peter Griffin, for the Board of Directors of Stelco Inc.

K. Mahar, for the Monitor

David R. Byers, for CIT Business Credit, Agent for the DIP Lender

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

PART I - INTRODUCTION

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act[1] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies - Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. - which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the

respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability - exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation - as opposed to their own best interests as shareholders - in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

PART II - ADDITIONAL FACTS

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board,

through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package."

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps." Mr. Keiper expressed confidence that "there was value to the equity of Stelco," and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole," Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters." Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing - and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" - the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral." They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted

themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

PART III - LEAVE TO APPEAL

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), (2002) 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

a) whether the point on appeal is of significance to the practice;
b) whether the point is of significance to the action;
c) whether the appeal is prima facie meritorious or frivolous;
d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

PART IV - THE APPEAL

The Positions of the Parties

27 The appellants submit that,

a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Algoma Steel Inc. (2001), 25 C.B.R. (4th) 194, at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group - particular investment funds that have acquired Stelco shares during the CCAA itself - have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Olympia & York Development Ltd. v. Royal Trust (1993), 12 O.R. (3d) 500 (Gen. Div.); Re Ivaco Inc., (2004), 3 C.B.R. (5th) 33, at para. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA." He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786 (Sup. Ct.) at para. 11. See also, Re Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 320; Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 (Ont. Gen Div. [Commercial List]), Royal Oak Mines Inc. (Re) (1999), 7 C.B.R. (4th) 293 (Ont. Gen Div. [Commercial List]); and Westar Mining Ltd. (Re) (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law," permitting the court "to maintain its authority and to prevent its process being obstructed and abused." It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner." See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475 (S.C.C.) at 480; Richtree Inc. (Re), [2005] O.J. No. 251 (Sup. Ct.).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard,

I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,[2] rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court," supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however - difficult as it may be to draw - between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose."[3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion - in spite of its considerable breadth and flexibility - does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court	11(1) Notwithstanding anything in the Bankruptcy and

Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors." But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corporation Limited v. Banking Service Corporation Limited (1923), 23 O.W.N. 138 (Ont. H.C.); Stephenson v. Vokes (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.[4] The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court - where it finds that oppression as therein defined exists - to "make any interim or final order it thinks fit," including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office." This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722.

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

49 At paragraph 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual. [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them." Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"[5]:
>
> > SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention.* The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation.* If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors

> should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager. [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors - in which capacity they participated over two days in the bid consideration exercise - in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach." However, he simply decided there was a risk - a reasonable apprehension - that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium - the shareholders represented by the appellants on the Board - had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation," as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach."

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc (Trustee of). v. Wise, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well - in the context of "the shifting interest and incentives of shareholders and creditors" - the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Limited (2003), 63 O.R. (3d) 78 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

66 In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289 (C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.[6]

67 McKinlay J.A then went on to say:

> There can be no doubt that on an application under s. 234[7] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra, Sammi Atlas Inc. (Re) (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd. (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation," but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) - which describes the directors' overall responsibilities - and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate." Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential

approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion - not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction - a jurisdiction which feeds the creativity that makes the CCAA work so well - in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco," and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the

care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants - including the respondents in this case - but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise." With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

PART V - DISPOSITION

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

R.A. BLAIR J.A.
S.T. GOUDGE J.A. - I agree.
K.N. FELDMAN J.A. - I agree.

cp/ln/e/qljxh/qlkjg/qlgxc/qlmlt

1 R.S.C. 1985, c. C-36, as amended.

2 The reference is to the decisions in Dyle, Royal Oak Mines, and Westar, cited above.

3 See paragraph 43, infra, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, Shareholder Remedies in Canada (Markham: LexisNexis ' Butterworths ' Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

Tab 5

Indexed as:

Chef Ready Foods Ltd. v. Hongkong Bank of Canada

IN THE MATTER of The Company Act R.S.B.C. 1979, C. 59
AND IN THE MATTER of The Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36
AND IN THE MATTER of Chef Ready Foods Ltd. and Istonio Foods Ltd.
Between
Chef Ready Foods Ltd., Respondent, (Petitioner), and
Hongkong Bank of Canada, Appellant, (Respondent)

[1990] B.C.J. No. 2384

[1991] 2 W.W.R. 136

51 B.C.L.R. (2d) 84

4 C.B.R. (3d) 311

23 A.C.W.S. (3d) 976

1990 CanLII 529

Vancouver Registry: CA12944

British Columbia Court of Appeal

Carrothers, Cumming and Gibbs JJ.A.

Heard: October 12, 1990
Judgment: October 29, 1990

Debtor and creditor -- Arrangement under companies' creditors arrangement act -- Bank Act security -- Priority.

Appeal from a stay order issued under the Companies' Creditors Arrangement Act. Bank supplying credit and services to Chef Ready, and holding security under section 178 of the Bank Act. Bank commencing proceedings upon its security. Chef Ready petitioning for relief under the Companies'

Creditors Arrangement Act. Order issued staying realization on any security of Chef Ready. Issue whether Bank Act security should be exempt from the order.

HELD: Appeal dismissed. Nothing in the Companies' Creditors Arrangement Act exempted any creditors from the provisions of the Act, and nothing in the Bank Act excluded the impact of the Companies' Creditors Arrangement Act. Bank's interest not defeated, but its right to seize and sell postponed. Broad protection of creditors in the Companies' Creditors Arrangement Act to prevail over the Bank Act. Section 178 security included in the term "security" in the Companies' Creditors Relief Act.

STATUTES, REGULATIONS AND RULES CITED:

Bank Act, R.S.C. 1985, c. B-1, s. 178, 179.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 8, 11.

Counsel for the Appellant: D.I. Knowles and H.M. Ferris.
Counsel for the Respondent: R.H. Sahrmann and L.D. Goldberg.

GIBBS J.A. (for the Court, dismissing the appeal):-- The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.443 per day. Chef Ready did not pay.

On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under

the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A. for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

> "I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

> " 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> " THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property right or security held by that person firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"
>
> (Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

> " ii. Notwithstanding anything in the Bankruptcy Act or the Winding-Up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-Up Act or either of them;
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding ... against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

"NATURE OF ORDER SOUGHT

> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in Bank of Montreal v. Hall, [1990 1 S.C.R. 121, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in Flintoft v. Royal Bank of Canada (1964), S.C.R. 631.

The principal issue in Hall was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However a few extracts will serve to illustrate the Bank's reliance:

> "... a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)
>
> "... the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p. 139)
>
> "... These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)
>
> "The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)
>
> "... the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act ..." (p. 143)
>
> "The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods ..." (p. 152)
>
> "... it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)

> "... Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards at p. 587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

> " It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)
>
> " There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid

> and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.
>
> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations." (p. 590)

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as Meridian Developments Inc. v. T.D. Bank (1984), 52 C.B.R. 109 (Alta. Q.B.); Northland Properties Limited v. Excelsior Life Insurance Company (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que. C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que. S.C.); and Norcen Energy Resources v. Oakwood Petroleums (1988) 72 C.B.R. 2 (Alta. Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails.

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. it follows that the appeal is dismissed.

GIBBS J.A.
CARROTHERS J.A.:-- I agree.
CUMMING J.A.:-- I agree.

Tab 6

Case Name:

Stelco Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other applicants listed in Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36, as amended

[2005] O.J. No. 4733

Docket: M33099 (C44332)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, M. Rosenberg and H.S. LaForme JJ.A.

Heard: November 2, 2005.
Judgment: November 4, 2005.

(32 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Appeal by debenture holders from orders, reported at [2005] O.J. No. 4309, approving agreements involving steel company in bankruptcy protection, necessary for success of company's plan of arrangement, dismissed -- Motions judge had jurisdiction to make orders where power of debenture holders to vote down proposal preserved and agreements had support of other stakeholders and Monitor -- Companies' Creditors Arrangement Act, s. 11.

Insolvency law -- Proposals -- Court approval -- Appeal by debenture holders from orders approving agreements involving steel company in bankruptcy protection, necessary for success of company's plan of arrangement, dismissed -- Motions judge had jurisdiction to make orders where orders did not amount to approval of plan of arrangement -- Debentures holders' power to vote down proposed plan not usurped -- Companies' Creditors Arrangement Act, s. 11.

Application by a committee of senior debenture holders for leave to appeal from orders authorizing Stelco to enter into agreements with two stakeholders and a finance provider. A group of equity

holders supported the application, while other stakeholders and the Monitor supported the orders. Stelco and its four subsidiaries obtained protection from their creditors in 1994 *ES*. Stelco's attempts over twenty months to restructure were unsuccessful, in part because certain stakeholders continually exercised veto powers. Stelco's board of directors negotiated agreements with the stakeholders, the Ontario government and the steelworkers union, and Tricap Management, necessary to the success of Stelco's proposed plan of arrangement. The debenture holders objected to terms of the agreements providing for fees payable to Tricap and providing Ontario with power to accept or reject members of Stelco's board of directors. The debenture holders did not propose an alternate plan of arrangement, but made it clear they would not support the one on the table. The motions judge stated in his reasons he was not approving Stelco's plan, but did not think the plan was doomed to fail. He scheduled a meeting of creditors to vote on the plan for November 2005.

HELD: Application allowed. Leave to appeal was granted and the appeal was dismissed. Leave to appeal was granted because the debenture holders raised a novel and important point that was significant to the action. The appeal was prima facie meritorious, and would not unduly interfere with Stelco's continuing negotiations. The appeal was dismissed because the judge had jurisdiction to make the orders approving the agreements, as the orders did not usurp the debenture holders' power to ultimately decide on whether or not to approve Stelco's plan. It was open to the motions judge to find the plan was not doomed to fail, despite the position of the debenture holders, because of the support the plan had from other stakeholders and the Monitor.

Statute, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 11, 11(4), 13

Appeal From:

On appeal from the orders of Justice James M. Farley of the Superior Court of Justice made on October 4, 2005.

Counsel:

Robert W. Staley and Alan P. Gardner for the Informal Committee of Senior Debentureholders, Appellants

Michael E. Barrack and Geoff R. Hall for Stelco Inc., Respondent

Robert I. Thornton and Kyla E.M. Mahar for the Monitor, Respondent

John R. Varley for Salaried Active Employees, Respondents

Michael C.P. McCreary and David P. Jacobs for USW Locals 8782 and 5328, Respondents

George Karayannides for EDS Canada Inc., Respondent

Aubrey E. Kauffman for Tricap Management Ltd., Respondents

Ben Zarnett and Gale Rubenstein for the Province of Ontario, Respondents

Murray Gold for Salaried Retirees, Respondents

Kenneth T. Rosenberg for USW International, Respondents

Robert A. Centa for USWA, Respondents

George Glezos for AGF Management Ltd., Respondents

The judgment of the Court was delivered by

1 **M. ROSENBERG J.A.**:-- This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the CCAA and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the CCAA proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the CCAA process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge.

2 Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

THE FACTS

3 Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the CCAA on January 29, 1994. Thus, the CCAA process has been going on for over twenty months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11 of the CCAA gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

4 While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (i.e. they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

5 In an attempt to successfully emerge from CCAA protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the Ontario Agreement), an agreement with The United Steelworkers International and Local 8782 (the USW Agreement), and an agreement with Tricap Management Limited (the Tricap Agreement). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

6 The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to $10.75 million depending on the circumstances. Tricap

will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice to seek court approval of agreements of this importance. The appellant submits that the motions judge had no jurisdiction to make these orders.

7 There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the CCAA process.

8 Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors meeting on November 15th to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

9 Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap".

10 Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

11 Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

12 Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons:

> The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

LEAVE TO APPEAL

13 The parties agree on the test for granting leave to appeal under s. 13 of the CCAA. The moving party must show the following:

(a) the point on appeal is of significance to the practice;
(b) the point is of significance to the action;
(c) the appeal is prima facie meritorious; and
(d) the appeal will not unduly hinder the progress of the action.

14 In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the status quo but authorize key elements of the proposed plan of arrangement. The point is of obvious significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap Agreement, that could further deplete the estate. The appeal is prima facie meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, the appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

15 For these reasons, I would grant leave to appeal.

ANALYSIS

Jurisdiction generally

16 The thrust of the appellant's submissions is that while the judge supervising a CCAA process has jurisdiction to make orders that preserve the status quo, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for the business judgement of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the CCAA. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

17 Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

18 In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in Hongkong Bank v. Chef Ready Foods (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at para. 10:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11. [Emphasis added.]

19 In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgement of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

20 The argument that the orders are coercive and therefore unreasonably interfere with the rights of the creditors turns largely on the potential $10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

21 Further, the motions judge both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15th whether this plan will be approved.

Doomed to fail

22 The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In Re Inducon Development Corp. (1991), 8 C.B.R. (3d) 306 (Ont. Ct. (Gen. Div.)) at 310 Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

23 However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 7 O.R. (3d) 362 (Div. Ct.) at 369:

> The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused.

> The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally ... [Emphasis added.]

24 It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business judgment of the Stelco board as a way out of the CCAA process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the CCAA proceedings.

25 The motions judge said this in his reasons:

> It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

26 I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the CCAA process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5 at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, [1993] O.J. No. 14, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and

> object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts. [Emphasis added.]

27 The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

28 The position of the appellant also fails to give any weight to the broad range of interests in play in a CCAA process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [Emphasis added.]

29 For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

30 The equity holders support the position of the appellant. They point out that the Stelco CCAA situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005, the motions judge recognized this unusual state of affairs:

> In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporations was so for under water, is very substantially diminished. For example, the old shares may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above."

31 The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

DISPOSITION

32 Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

M. ROSENBERG J.A.
J.I. LASKIN J.A. -- I agree.

Tab 7

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Global Communications Corp. and the other applicants listed on Schedule "A"

[Editor's note:
Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

[2009] O.J. No. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the

"GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders.

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those con-

tained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the

> CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends

to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v.*

Bricore Land Group Ltd.[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with

paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

cp/e/qlrds/qljxr/qlced/qlaxw/qlcas

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

Tab 8

Case Name:

Bank of Montreal v. NFC Acquisition GP Inc.

IN THE MATTER OF a Plan of Compromise or Arrangement of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp.
RE: Bank of Montreal, Applicant, and NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P., Respondents

[2012] O.J. No. 785

2012 ONSC 1244

Court Files Nos. CV-12-9554-00CL and CV-12-9616-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: February 22, 2012.
Judgment: February 22, 2012.

(18 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motion by secured creditor to lift stay of proceedings to permit it to apply for appointment of receiver allowed -- Initial order was made which approved sales process and made of additional commitments under DIP facility available if sales process successful -- Sales process ultimately unsuccessful, DIP lender delivered notice of sales process default and withdrew funding, debtor company's board resigned and debtor company ceased operations -- No alternative to appointing receiver as sales process had fallen apart, DIP lender had served notice of sales process default and debtors had no access to funds -- No prospect of successful CCAA process.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by secured creditor to lift stay of proceedings to permit it to apply for appointment of receiver allowed -- Initial order was made which approved sales process and made of additional commitments under DIP facility available if sales process successful -- Sales process ultimately unsuccessful, DIP lender

delivered notice of sales process default and withdrew funding, debtor company's board resigned and debtor company ceased operations -- No alternative to appointing receiver as sales process had fallen apart, DIP lender had served notice of sales process default and debtors had no access to funds -- No prospect of successful CCAA process.

Motion by a secured creditor for an order lifting the stay of proceedings in the Creditors' Companies Arrangement Act ("CCAA") matter to permit it to apply to appoint a receiver over the assets of the debtor companies. In January 2012, an initial order was made under the CCAA in respect of the debtor companies which approved a sale process in respect of the companies and the availability of additional commitments under the DIP facility which was tied to the success of the sales process. Three offers were received as a result of the sales process. However, two of the bidders ultimately withdrew from the sales process. The remaining bidder was prepared to proceed, but required the DIP lender to advance the remaining $7 million in the DIP facility. The DIP lender delivered notice that a sales process default had occurred under the DIP facility and no further funding was availably. Subsequently, the debtor's board of director's resigned, the employees were advised there was no work and the company ceased operations. The secured creditor, who was also the DIP lender, sought to lift the stay and appoint a receiver. The motion was supported by the monitor and was not opposed by any party.

HELD: Application allowed. There was no alternative to appointing a receiver. The sales process had fallen apart and the DIP lender declined to make further advances and had served a notice of sales process default, which resulted in the debtors having no further access to funds. Furthermore, the board of directors had resigned, which reduced the prospects of a successful CCAA process to nil.

Statutes, Regulations and Rules Cited:

Creditors' Companies Arrangement Act,

Counsel:

E. Lamek and C. Fell, for the Monitor and proposed Receiver, FTI Consulting Canada Inc.

C. Prophet and F. Lamie, for the Applicant, Bank of Montreal.

D. Bish and A. Slavens, for the NFC Debtors.

P. Osborne and B. Gray, for certain Directors of the Debtors.

D. Bulas, for Edgestone Capital.

H. Chaiton, for Westco MultiTemp Distribution Centres Inc.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Motion to lift a *CCAA* stay to appoint a receiver

1 The Bank of Montreal, the senior secured creditor of the debtor respondents, NFC Acquisition GP Inc., NFC Acquisition Corp., NFC Land Holdings Corp., New Food Classics, and NFC Acquisition L.P. (the "Debtors"), moves for an order lifting the stay of proceedings in the *CCAA* matter (CV-12-9554-00CL) to permit it to apply to appoint FTI Consulting Canada Inc. as receiver of all of the property, assets and undertaking of the Debtors.

II. Background events

2 NFC produces ground and formed meats and held a 40% market share of the market for frozen burgers sold in grocery stores. On January 17, 2012 Morawetz J. made an Initial Order under the *CCAA* in respect of NFC Acquisition GP Inc., NFC Acquisition Corp. and NFC Land Holdings Corp. (the "NFC Entities"). Two features of the Initial Order are of particular relevance to this motion. First, the Court approved a sale process in respect of the NFC Entities. Second, under the terms of the approved DIP facility, the availability of additional commitments under the facility beyond the initial $3.5 million was tied to the success of the sales process - if a Sales Process Default occurred, there would be no further availability of funds under the DIP Facility.

3 The Monitor, FTI Consulting Canada Inc., has filed a Third Report dated February 21, 2012 describing the results of the sales process. Three final offers were received by the February 13, 2012 deadline. The Monitor then worked with NFC management to refine the terms of two bids.

4 On February 13 a Major Customer of NFC advised the company that it had one day to match a competitive bid from another supplier of certain products which had proposed to reduce its prices to the Major Customer. The Monitor informed the two final bidders of this development. Between February 13 and 20 discussions took place amongst the Monitor, NFC, the two final bidders and the Major Customer to ascertain whether a transaction could be structured that would result in a going concern sale of the NFC Saskatoon production facility, or possibly both NFC production facilities.

5 Under the terms of the Sales Process NFC had until the close of business on February 17 to put forward to BMO, in its capacity as DIP Lender, a form of agreement of purchase and sale so that the bank could determine whether it would make further advances under the DIP Facility.

6 On February 17 one of the two final bidders withdrew from the sales process. The remaining bidder was prepared to proceed with an amended offer, but one which would require the DIP Lender to advance the remaining $7 million in the DIP Facility.

7 On Monday, February 20 BMO delivered a notice that a Sales Process Default had occurred under the DIP Facility. Further funding was no longer available to the Debtors. That evening the Board of NFC resigned *en masse*. Management posted notices at the Debtors' facilities advising the employees that no work would be available for them the next day, Tuesday, February 21. That has led the Monitor to make the following recommendation:

> In light of the delivery of the Default Notice by BMO, the resignation of the NFC Board of Directors and management, the lack of funding for NFC's business and the perishable nature of NFC's inventory, the Monitor is of the view that it is vital to have an immediate and orderly shut-down of the NFC manufacturing operations and a swift transition to a court-appointed receivership of the assets of NFC. The Monitor is hopeful that a buyer for the closed NFC manufacturing faculties can be quickly identified among the parties that participated in the Transaction Process,

and that the manufacturing facilities can be sold on a turn-key basis in a short period of time, rather than liquidated.

The Monitor has prepared a cash flow projection for the conduct of a shut-down receivership for the assets of NFC, which would be funded pursuant to Receiver's Certificates. BMO has agreed to fund such Receiver Certificate amounts on a basis and priority consistent with the existing DIP Facility and DIP Charge.

8 As of February 20, 2012 the Debtors owed BMO approximately $24.5 million. BMO is the senior secured creditor and the DIP Lender. The priority position of the BMO is not in dispute.

9 BMO applies for a lifting of the stay in the *CCAA* proceeding and the appointment of a receiver over the Debtors to secure the property and assets of the Debtors, including the perishable food inventory, and to proceed with an orderly realization and maximization of the value of the Debtors' assets. Paragraph 36(b) of the Initial Order provided that upon the occurrence of an event of default under the Definitive Documents, BMO, as DIP Lender, could apply to the court for the appointment of a receiver. A Sale Process Default is a Specified Event of Default, and BMO gave notice of such a default this past Monday.

10 FTI has consented to act as receiver of the Debtors.

II. Analysis

11 In *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (S.C.J.) Pepall J. summarized the principles which should guide a court when facing a request to lift a stay of proceedings under the *CCAA*:

> 32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.
>
> 33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*, [2000] A.J. No. 1692, and Professor McLaren has added three more since then. They are:
>
> 1. When the plan is likely to fail.
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor

would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

12 Turning to the present case, BMO gave notice of its motion by e-mail yesterday to those on the Service List in the *CCAA* proceedings. Under the circumstances such short notice was necessary, and I validate the short service.

13 No party has appeared to oppose the motions to lift the stay and appoint a receiver. The Monitor supports the lifting of the stay and the appointment of a receiver. The Monitor also advised that the Saskatoon local of the employees' union does not oppose the orders sought.

14 Quite frankly, on the evidence before me, I see no other alternative than appointing a receiver. The Sales Process has fallen apart as a result of the inability to work out an arrangement with the Major Customer. Consistent with the terms of the DIP Facility approved in the Initial Order, BMO, as DIP Lender, has declined to make further advances and has served a notice of Sales Process Default. As a result, the Debtors have no access to further working funds.

15 The Board of the Debtors resigned *en masse* two days ago; the Debtors are rudderless, reducing the prospects of a viable proposal in the *CCAA* process down to nil. The Monitor advises that management instructed employees not to report to work yesterday, so the Debtors are not carrying on any business at the moment. A significant inventory of meat products sits in the Saskatoon facility, although the Monitor advises that any fresh meat either has been shipped out or frozen. In a very real sense the Debtors have ceased carrying on business as a going concern.

16 The appointment of a receiver is required to stabilize this situation for the benefit of all stakeholders of the Debtors.

17 BMO has filed a draft receivership order which contains some amendments to the Commercial List Model Receivership Order. I reviewed the proposed amendments with counsel in open court and heard submissions and explanations on some of the proposed changes. No party opposes the proposed draft receivership order. BMO and the receiver clarified that with respect to paragraphs 24 and 26 of the proposed order, the receiver will be bound by the terms of the February 7, 2012 letter from the Monitor to Westco which was placed before the court on the motion to obtain the February 16, 2012 extension order. BMO and the receiver confirmed, at the request of Debtors' counsel, that the orders sought would not terminate the existing *CCAA* proceedings.

18 In sum, I conclude that the pressing circumstances in which the Debtors find themselves make it just and reasonable to appoint a receiver over them. I therefore grant BMO's motion to lift the stay

of proceedings in the *CCAA* matter, and I grant the Bank's motion to appoint FTI Consulting as receiver over the Debtors. I have signed the draft orders submitted by BMO.

D.M. BROWN J.

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Tab 9

1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362

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1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

In the Matter of a Plan of Compromise or Arrangement of the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge

The Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge, Applicant

Ontario Superior Court of Justice [Commercial List]

Blair J.

Judgment: July 28, 1999
Docket: 98-CL-002970

Counsel: *Benjamin Zarnett* and *Jessica Kimmel*, for applicant, Red Cross.

Charles M. Wright, for respondent, Barbara Baker et al.

John Spencer, for respondent, Attorney General of Canada.

Michael Kainer, for respondent, SEIU.

Carlton Mathias, for respondent, Bayer Corp.

Mary Margaret Fox, for respondent, Dominion of Canada General Insurance Company.

D. Ward, for respondents, Provinces & Territories (except Que.).

P. Huff, for respondent, 1986-1990 Hemophiliac, HCV claimants.

Jeff Carhart, for respondents, Québec Government & Hema-Québec.

Ken Arenson, for respondents, Certain Individual Claimants.

D. Harvey, for respondents, pre-86/post 90 HCV claimants.

J.H. Grout, for respondent, Monitor, Ernst & Young Inc.

Gary Smith, for respondents, pre86/post 90 BC HCV claimants.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Bankruptcy --- Proving claim — Practice and procedure — Miscellaneous issues

Motion by individual for order lifting Companies' Creditors Arrangement Act stay in order to permit her leave to to file class proof of claim in this proceeding, on her own behalf and on behalf of class of persons said to be exposed to infection as result of receiving transfusions of blood tainted or contaminated by Creuzfeld-Jakob Disease — Motion dismissed — This was not case to consider whether class proofs of claim were permissible in Canadian insolvency proceedings — It was matter for discretion of insolvency judge whether to permit filing of class proof of claim — Would not exercise discretion in circumstances to permit such filing.

Practice --- Parties — Representative or class actions — General

Motion by individual for order lifting Companies' Creditors Arrangement Act stay in order to permit her leave to commence class action proceeding on her own behalf and on behalf of class of persons said to be exposed to infection as result of receiving transfusions of blood tainted or contaminated by Creuzfeld-Jakob Disease — Motion dismissed — Potential CJD claimants have received adequate notice of claims filing procedure designed to enable claimants to vote on proposed plan — Red Cross proceedings have been ongoing for more than year with very high profile — CCAA schedule was modified so timing of it and Red Cross proceedings would mesh — Didn't want to impose another feature into CCAA procedure which might upset timing — Claims procedure for voting purposes which had already been put in place with concurrence of various groups of transfusion claimants was one which was founded upon individual voting by claimants with respect to plan.

Cases considered by *Blair J.*:

Matter of American Reserve Corp. (1988), 840 F.2d 487, 56 U.S.L.W. 2497, 10 Fed. R. Serv. 3d 868, 17 Bankr. Ct. Dec. 504 (U.S. 7th Cir. Ill.) — referred to

Reid v. White Motor Corp. (1989), 886 F.2d 1462 (U.S. C.A. 6th Cir.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — pursuant to

MOTION by individual for order lifting *Companies' Creditors Arrangement Act* stay in order to permit her leave to commence class action proceeding and to file class proof of claim.

***Blair J.*:**

1 This Motion is brought on behalf of Ms. Barbara Baker for an Order lifting the CCAA stay in order to permit her leave to commence a class action proceeding, and to file a class proof of claim in this proceeding, on her own behalf and on behalf of a class of persons said to be exposed to infection as a result of receiving transfusions of blood tainted

or contaminated by Creuzfeld-Jakob Disease ("CJD"). CJD is a terrible malady — an infectious, rapidly progressive, fatal brain-deteriorating disease for which there is apparently no known treatment or cure.

2 The issue to be considered here is not the tenability of such a class action proceeding or the question of whether or not the proposed class would be certified. These are matters for the class action proceeding itself, if it is to proceed. The issue here is whether it would be helpful and effective from the perspective of blood claimants exposed to CJD *and* with respect to the overall processing of the Red Cross CCAA proceeding itself — including, of course, the timely and fair compensation of Transfusion Claimants as a whole from the proceeds made available through the proposed Plan, if accepted and approved — to lift the stay for the reason proposed.

3 In the particular circumstances of this restructuring proceeding I am not satisfied that it is necessary, or that it would be appropriate, to grant the relief sought. The motion is therefore dismissed.

4 There are a number of reasons for arriving at this conclusion.

5 First, the real issue is whether or not the potential CJD claimants have received adequate notice of the claims filing procedure designed, initially, to enable claimants to vote on the proposed Plan. A carefully constructed and elaborate notification procedure has been established and put into effect. It was arrived at after extensive negotiations amongst the myriad of claimants' representatives and finalized after full argument in Court. It included nation-wide notification in the national newspaper media on three occasions. It is readily apparent from the introductory words of the Notice itself that those who should claim included *anyone* with a direct or indirect blood claim against the Red Cross. A number of CJD claimants have already filed claims and numerous others have contacted the Red Cross or the Monitor. Ms Baker herself is Plaintiff in an Alberta action commenced against the Red Cross in 1996 and she received direct notification through her solicitors, as did other similar claimants. There is really no evidence that there have been any difficulties from inadequate notice to CJD claimants.

6 Secondly, I am not satisfied that any notification procedure evolving out of a commenced but then stayed class action proceeding would yield any different results. Neither the Red Cross nor the Monitor knows who the potential claimants are. Ms Baker's proposed class action solicitors appear not to know either.

7 Thirdly, the Red Cross proceedings have been ongoing now for more than a year. They have had a very high profile, accompanied by wide spread publicity. This factor in itself carries with it a certain momentum for the discovery and assertion of claims.

8 Fourthly — and against the background of the foregoing — the Red Cross proceedings themselves have developed a certain taut dynamic between the assertion of claims within the CCAA umbrella and the pending settlement of claims between at least a large group of the Transfusion Claimants and the various Governments. The proposed Plan is closely related to the successful completion of the Government settlement, and the timing of these proceedings is being synchronized with the timing of the approval and implementation of the latter. In an earlier motion today the CCAA schedule was modified so that the timing of the two would mesh.

9 There are two implications arising from this fourth point. In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where — as I have indicated — I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place — with the concurrence of the various groups of Transfusion Claimants — is one which is founded upon individual voting by claimants with respect to the Plan.

10 I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly

underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order that Claimants receive what compensation they are entitled to as early as possible.

11 This is not the case, in my view — because it is not necessary to do so — to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has — as Mr. Wright's factum put it — "a lengthier history of class proceedings," class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. Ill. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

12 The Motion is therefore dismissed. I do not rule out, by this disposition, the possible appointment of Representative Counsel for the CJD claimants in this proceeding (similar to those already appointed for the various groups of Transfusion Claimants) should it be felt and determined to be necessary or appropriate in the future.

Motion dismissed.

END OF DOCUMENT

Tab 10

Case Name:

Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended
AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 as amended
AND IN THE MATTER OF A Plan of Compromise or Arrangement of Air Canada and those Subsidiaries listed on Schedule "A"
AND IN THE MATTER OF United Airlines Inc. of the State of Delaware, in the United States of America and the other Entities listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[2004] O.J. No. 527

47 C.B.R. (4th) 177

128 A.C.W.S. (3d) 1069

2004 CarswellOnt 481

Court File Nos. 03-CL-4932 and 03-CL-5003

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: January 27, 2004.
Judgment: February 2, 2004.

(9 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' Creditors Arrangement Legislation -- Stay of proceedings against debtor.

Motion by the plaintiffs in proposed class proceedings to lift a stay under the Companies' Creditors Arrangement Act. By a previous motion, the stay had been lifted for the limited purposes of Air

Canada providing responding certification materials. Air Canada had provided such materials. The plaintiffs sought to relitigate the stay now that the materials had been provided so that they could proceed with their litigation in the ordinary course.

HELD: Motion dismissed. The lifting of the stay had been considered previously. There were no new circumstances justifying reconsideration. The provision of responding materials was foreseen in the previous order.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

John Legge and William M. Sharpe, for the moving parties, Always Travel Inc., Highbourne Enterprises Inc., and Canadian Standard Travel Agent Registry (CSTAR).
Katherine L. Kay and Nicholas P. McHaffie, for the responding party, Air Canada.
Michael A. Penny and Tycho Manson, for the responding party, United Airlines Inc.
Peter J. Osborne and Monique Jilesen, for the Monitor, Ernst & Young Inc.
Howard A. Gorman, for the Unsecured Creditors' Committee.
Robert I. Thornton and Gregory R. Azeff, for GECAS.
Jeremy E. Dacks, for GE Capital.

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1 **FARLEY J.** (endorsement):-- This endorsement applies to both the Air Canada (AC) matter (Court File No. 03-CL-4932) and the United Airlines Inc. (UA) matter (Court File No. 03-CL-5003), mutatis mutandis. These are the promised reasons for dismissing the motion of the moving parties (plaintiffs in the proposed class proceedings in the Federal Court). They should be read in conjunction with and as incorporating my previous decisions in each file released September 24, 2003.

2 It does not appear to me that there is anything which is truly new in the sense of not being contemplated at the time of the September 11, 2003 hearings and as to which I gave my decisions on September 24, 2003. Those decisions provided that the stay was lifted for limited purposes of AC and UA providing their responding certification materials (which they have done). That was with the object of benefiting both the plaintiffs on the one side and AC and UA on the other with respect to the proposed insolvency reorganizations of AC and UA respectively. With respect, the fact that AC and UA have so provided their responding certification materials was a contemplated matter and thus nothing new; that occurrence ought not to have been taken as an invitation to come back to this court to in essence relitigate the September 2003 motions all over again. Those decisions have not been appealed and thus those issues which were then dealt with (or ought to have been raised) are res judicata. I note that even if one were to view them as not technically res judicata for any particular purpose, it would to my view be an abuse of process to attempt this relitigation as in substance it would appear to be at least a collateral attack on the September 2003 decisions.

3 I specifically note the thoughtful observation of Hugessen J. in his May 30, 2003 and December 10, 2003 reasons that this court is the proper court to deal with the extent and timing of a stay in the context of the CCAA proceedings and that "Farley J. is still [December 10, 2003] the proper person to decide whether allowing the present class action certification proceedings to continue beyond the present stage would be detrimental to, or might hinder the proper administration of the CCAA proceedings." It seems to me that the plaintiffs ought to take into account that both the AC and the UA insolvency proceedings are fast approaching the time when, if the reorganizations are successful, then both these airlines will enter into the post-emergence stage. Any fresh alleged wrongdoing (i.e. wrongdoing in the post-emergence period) would of course not be affected by any stay. With respect to pre-filing activity, then these claims can be accommodated within the general claims procedure in either insolvency proceedings. It seems to me that what the plaintiffs are suggesting is that AC and UA continue as defendants in the class proceedings action as if there were no insolvency proceedings which are in fact aimed at resulting in a reorganization and that once this litigation has been finally dealt with, then the extent of liability (if any) of AC and UA will be known and might then be applied back into the insolvency proceedings as a proven claim.

4 Even at the most optimistic time scheduling this would appear to be contemplating that the insolvency proceedings would in effect be held up for at least a year subsequent to the presently contemplated emergence of either airline. The magnitude of the plaintiffs' claims are that if allowed at anything approximating the amounts claimed, they would probably have a material affect upon the voting views of the other creditors involved.

5 With respect, the plaintiffs have not focussed on the test for lifting a CCAA stay as discussed by Paperny J. in Re Canadian Airlines Corp. (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) at pp. 6-8. Instead, the plaintiffs have in my view quite mistakenly addressed the situation as an ordinary lift stay situation, citing Church & Dwight Ltd. v. Sifto Canada Inc. (1994), 20 O.R. (3d) 483 (Gen. Div.), or as a lift stay pursuant to a bankruptcy lift stay situation, citing Re Ma, [2000] O.J. No. 2954 (Dep. Reg. Ont.) affirmed (2000), 20 C.B.R. (4th) 267 (Ont. Bankruptcy), affirmed (2001), 24 C.B.R. (4th) 68 (Ont. C.A.); Ontario New Home Warranty Program v. Chevron Chemicals (1996), 41 C.B.R. (3d) 100 (Dep. Reg. Ont.); Arrojo Investments v. Cardamone, [1995] O.J. No. 4545 (Gen. Div.). In the bankruptcy situations where a trustee has taken over the assets and undertaking of a bankrupt, a reorganization for the benefit of all stakeholders - including litigation claimants - is not contemplated except in very rare and exceptional circumstances. However, what we have here in both the AC and UA situations is an insolvent corporation (not a bankrupt one) which is attempting within a relatively short period of time to reorganize itself for the benefit of all stakeholders. There is no trustee in bankruptcy appointed to take over the assets and undertaking in a reorganization; in a bankruptcy situation, as is noted in those bankruptcy cases, it is important to determine whether the trustee in bankruptcy objects to the litigation continuing (frequently a trustee will not object so long as it does not, as trustee, become involved (and embroiled) in the continuing litigation).

6 The reorganization stay provision has to be viewed in light of the Parliamentary objectives of the CCAA. See a discussion of the CCAA objectives in Re Lehndorff General Partner Ltd. (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). As to the stay itself, see Gibbs J.A. for the Court in HongKong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 5 where he observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to

> the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

See also Blair J. in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at p. 309 where he stated:

> By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.
>
> ...
>
> ... in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

7 As it appears envisaged by the plaintiffs, they wish to proceed unimpeded by either the claims process in place or otherwise, in pursuing their litigation against AC and UA "in the ordinary course." As discussed, that litigation would be of major proportions, complexity and importance to these insolvent but attempting to reorganize corporations and their stakeholders. The effect on these restructuring efforts would be a fairly large multiple of cuts in the death of a thousand cuts which I was concerned about in the Re Air Canada (Regulators' Motions) released July 21, 2003.

8 I do not see that the plaintiffs have in fact presented any new - truly new - evidence to support their second request to lift the stay for the purpose of their carrying on the case in the Federal Court "in the ordinary course."

9 The plaintiffs' motions for a lift of the stay in this regard are dismissed. AC and UA requested costs of $10,000 for each airline. Costs in CCAA insolvency proceedings are sparingly asked for and even more sparingly given. In this case, I would think it appropriate to award some costs, but not at the level requested (albeit that the requested costs are nowhere near the actual costs to the airlines); the plaintiffs are to pay $1,000 to each of AC and UA, such costs to be paid forthwith and in no event later than March 1, 2004.

FARLEY J.

cp/e/nc/qw/qlmjb/qlhcs

Tab 11

Case Name:

Nations Petroleum Co. v. Beeston

Between
Donald Beeston, Respondent/Plaintiff, and
Nations Petroleum Company Ltd., Citic Canada Petroleum Ltd., Applicant/Defendants, and
Citic Canada Petroleum Ltd., Respondent/Defendant

[2010] A.J. No. 1244

2010 ABQB 668

Docket: 1003 08622

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

J.B. Veit J.

Heard: October 26, 2010.
Judgment: October 29, 2010.

(56 paras.)

Civil litigation -- Pleadings -- Particulars -- Inunctions -- Setting aside -- Special chambers application by Nations Petroleum Company Ltd., to (a) remove a requirement that it maintain the medical insurance, life insurance and other group benefits the plaintiff claimed survived his termination, and (b) for better particulars of benefits to which the plaintiff claimed an entitlement, allowed in part -- There were insufficient grounds to change the substance of the interlocutory order -- Although NPCL was unable to continue the group coverage, it was to continue to provide the substantive benefits which had formerly been provided in the group policies -- The particulars sought were material and they were ordered.

Employment law -- Discipline and termination of employment -- Civil procedure -- Injunctions -- Special chambers application by Nations Petroleum Company Ltd., to (a) remove a requirement that it maintain the medical insurance, life insurance and other group benefits the plaintiff claimed survived his termination, and (b) for better particulars of benefits to which the plaintiff claimed an en-

titlement, allowed in part -- There were insufficient grounds to change the substance of the interlocutory order -- Although NPCL was unable to continue the group coverage, it was to continue to provide the substantive benefits which had formerly been provided in the group policies -- The particulars sought were material and they were ordered.

Special chambers application by Nations Petroleum Company Ltd., to (a) remove a requirement that it maintain the medical insurance, life insurance and other group benefits the plaintiff Beeston claimed had survived his Dec. 15, 2009 termination, and (b) for an order requiring Beeston to provide particulars of the health care coverage and other benefits to which he claimed an entitlement. In the underlying action, Beeston argued NPCL wrongfully failed to maintain his health and insurance benefits after terminating his employment, contrary to a collateral contract to the written contracts of employment. Beeston obtained an interlocutory order prohibiting NPCL from cancelling or terminating his insurance and benefits, etc., until the trial of the action. NPCL now argued it was impossible to continue coverage for Beeston under the relevant insurance policies or to obtain comparable alternative group benefits for him. Beeston objected to any variation of the order. NPCL also sought particulars as to whether the alleged collateral agreement was written or oral, when and where it was made, which individual made the agreement on behalf of the defendants, etc. Beeston declined to provide that information, arguing it was in the nature of a request for evidence, which should not be contained in pleadings.

HELD: Application allowed in part. Although NPCL was entitled to apply for a variation of the case management judge's order, nothing it presented was sufficiently significant to have changed the substance of the case managing judge's original order. The quality of Beeston's claim remained the same, and the case management judge already found it met the test of either a serious issue to be tried or a strong prima facie case. The irreparable harm assessment had not changed, and neither had the assessment of the balance of convenience. The judge appeared to have decided that any inequity to the defendants in having to provide the benefits could be sorted out at trial. However, the previous order was varied to the extent that NPCL was not required to do the impossible, namely maintain group coverage for Beeston. NPCL satisfied the court it was unable to continue the group coverage provided to him by Cigna and Zurich. NPCL was, however, required to provide the substantive benefits which had formerly been provided in the group policies as they were immediately prior to the plaintiff's termination, until the trial. NPCL was also granted leave to return to court to ask for a variation of the existing temporary injunction once Beeston had provided the particulars which the court ordered. As for the particulars, NPCL's application was allowed. Where an alleged contract was central to an action, a plaintiff was required to provide full and complete particulars to enable the defendant to properly frame a defence. NPCL was asking for facts, not evidence, and the particulars it was demanding were material.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 104

Alberta Rules of Court, Nov. 1, 2010, Rule 1.2(1), Rule 1.2(2), Rule 13.6(2)(a)

Counsel:

H.J.D. McPhail, Q.C., for Nations Petroleum Company Ltd.

Louis M.H. Belzil, for Donald Beeston.

Memorandum of Decision

J.B. VEIT J.:--

Summary

1 In the Statement of Claim he filed in these proceedings, Donald Beeston claims a permanent mandatory injunction requiring the defendant Nations Petroleum Company Ltd. - his former employer - to maintain his health and insurance benefits after his employment terminated. Mr. Beeston grounds his claim in an alleged collateral contract to his written contracts of employment which latter contracts state, in the usual language, that no collateral contracts exist.

2 On an interlocutory basis, the case management judge prohibited Nations Petroleum Company Ltd. from cancelling or terminating Mr. Beeston's group medical benefits, life insurance, and other benefits to which Mr. Beeston claimed to be entitled as of December 15, 2009 - when his employment terminated - until the trial of the action which was forecast to be held by February 2011. The order also authorized Nations Petro to apply for a variance of the temporary injunction, or to seek further directions from the court, if Nations Petro encountered problems implementing the order.

3 On this special chambers application, Nations Petro requests two types of remedies. First, it asks the court to remove the requirement that it maintain the medical insurance, the life insurance and other such group benefits Mr. Beeston claims as surviving his December 15, 2009 termination by Nations Petro; Nations Petro alleges that it is not possible for it to continue coverage for Mr. Beeston under the relevant insurance policies or obtain comparable alternative group benefits for him. Mr. Beeston objects to any variation of the order; he states that it was the clear intention of the case managing judge to maintain coverage so that his claim was not potentially rendered moot.

4 Second, relying on Rule 104, Nations Petroleum asks the court to order Donald Beeston to provide particulars of the health care coverage and other benefits to which he claims an entitlement, including such items as whether the alleged agreement was written or oral, when and where the agreement was made, which individual made the agreement on behalf of the defendants, what was the term of the agreement, to what benefits did the alleged benefits agreement apply? Mr. Beeston declines to provide that information, arguing that the request is in the nature of a request for evidence, and that evidence should not be contained in pleadings.

5 On the issue of the temporary mandatory injunction, the court concludes that nothing which Nations Petro has presented on this application would be sufficiently significant to have changed the substance of the case managing judge's original order: the quality of Mr. Beeston's claim remains the same, the balance of convenience continues to favour Mr. Beeston and the irreparable harm assessment has not materially changed. However, this court varies the previous order to the extent that it does not require Nations Petro to do something which is impossible, i.e. maintain group coverage for Mr. Beeston: ***Baloun***, ***Broder Estate***, ***Gaunce***, *Injunctions and Specific Performance.* The court also grants Nations Petro leave to return to court to ask for a variation of the existing temporary injunction once Mr. Beeston has provided the particulars which the court orders.

6 On the issue of particulars, the court grants Nations Petro's application: where an alleged contract is central to an action, a plaintiff must provide full and complete particulars to enable the defendant to properly frame a defence: ***Bilow***, ***Abramsky***, ***Hardwood Forest Products***, ***Beaucage***, ***Dow Chemical Canada Inc.*** Nations Petro is not asking for evidence, it is asking for facts. The particulars which it is demanding are material: as just one example, the time when the alleged contract was made is extremely important given the relationship between Nations Petro, Nations Energy, and Mr. Beeston.

7 Although the new Rules of Court, scheduled to come into effect next week on November 1, 2010, are not technically applicable to this motion, the court observes that new Rule 13.6(2)(a) essentially deals with the same requirement as existing Rule 104. In addition, however, new Rule 1.2(1) and (2) refreshingly make explicit the objective of the Rules; those wholesome objectives should inform and infuse our process even now.

Cases and authority cited

8 **By Nations Petroleum Company Ltd.:** Robert J. Sharpe, *Injunctions and Specific Performance* (looseleaf) (Ontario: Canada Law Book, 2006) at para. 10.650; ***Baloun v. Farm Credit Corp.***, 1994 CarswellMan 251 at para. 14-15 (Man. Q.B.); ***Toronto (City) v. Republic Services Inc.***, 2006 CarswellOnt 4837 at para. 27 (Ont. Sup. Ct.); ***Broder Estate v. Broder***, 2005 CarswellAlta 1917, 2005 ABCA 442, at para. 22; ***Gaunce v. Gaunce***, 1997 CarswellNB 111 at paras. 3-5 and 7 (N.B. Q.B.); ***Canadian Commercial Bank (Liquidator of) v. McLaughlan***, 1988 CarswellAlta 190 at paras. 13-18, 21 (Q.B.); ***Wesley First Nation v. Alberta***, 2009 CarswellAlta 1071, 2009 ABQB 418, at paras. 16-23; ***Bilow v. R.***, 1993 CarswellNat 2400 (Fed. T.D.) at para. 20; ***Abramsky v. Canada*** (1985), 60 N.R. 6 (Fed. C.A.) at paras. 32-33; ***Hardwood Forest Products Co. v. 4121953***, [2005] M.J. No. 56, 2005 MBQB 42, at paras. 36, 38; ***Beaucage v. Grand & Toy Ltd.***, [2001] O.J. No. 5128 at paras. 19-22 (Ont. Sup. Ct.); ***Dow Chemical Canada Inc. v. Nova Chemical Corp.***, 2007 CarswellAlta 914, 2007 ABQB 463 at para. 20.

Appendix A: Extract from reasons of case management judge granting a mandatory injunction on the continuation of health benefits to the plaintiff

1. Background

a) Factual

9 Mr. Beeston worked for Nations Energy Co. Ltd. ("Nations Energy") from 1997 to December, 2006. Nations Energy was sold to Citic Canada Petroleum Ltd. ("Citic"), late in 2006. Citic was a completely unrelated company to Nations Energy. As Citic was not retaining a number of employees of Nations Energy after the sale, these employees received payment *in lieu* of notice.

10 Mr. Beeston was one of the employees who received a "change of control" payment which was expressly provided for in his contract of employment "in lieu of any notice of termination or payment in lieu thereof that Employee would otherwise be entitled to". His payment, together with stock options, totalled approximately $1,400,000.00.

11 Mr. Beeston was hired by Nations Petro on December 30, 2006 as a special projects manager after termination of his employment with Nations Energy. Mr. Beeston was provided with group health and life insurance benefit coverage pursuant to his written employment contract with Nations Petro. The written contract provides that, upon termination of employment, the employee's benefits will also terminate and Nations Petro will satisfy its termination obligations by the payment of sev-

erance pay in an amount equal to one month's base salary per year of service. The written contract also states that it supersedes all prior agreements, contains all the terms and conditions agreed upon by the parties and that no agreements or representations have been made by either party which are not set forth expressly in the written contract. Finally, the written agreement provides that any additions, alterations or modifications of the written agreement must be in writing and no oral agreement shall be effective.

12 Mr. Beeston has had three serious health episodes, the last two while employed by Nations Petro and the first while employed with Nations Energy. His health problems are now in remission but Mr. Beeston states that he believes he is unable to return to work in his previous employment ever again. Nor does Nations Petro have any work for Mr. Beeston to return to: the project Mr. Beeston was working on in California concluded in February/March of 2009 and there are no longer any Nations Petro employees working on that project or any comparable project. Nations Petro no longer has any active operations in Canada and only has one employee left in Canada. There is no work for Mr. Beeston with Nations Petro and if he had been actually working, he would have been laid off in February/March of 2009.

13 Nations Petro chose to terminate Mr. Beeston's employment, without cause, on December 15, 2009 and gave him 5 1/2 months' notice of its intention to terminate health benefits at the end of May 2010. Instead of basing the termination on the frustration provisions of the contract as it was entitled to do under the contract of employment, in which case no termination pay would be owing, Nations Petro chose to pay the plaintiff $45,164.23 U.S. in termination pay, which Mr. Beeston has refused to accept.

14 Prior to December 15, 2009, the parties agree that Mr. Beeston had the benefit of a group heath benefits policy with Cigna International. Amongst other benefits, that policy entitled employees to receive medical services anywhere in the world. Applying those benefits, Mr. Beeston had received medical treatment at the Mayo Clinic in the United States.

15 Prior to December 15, 2009, the parties agree that Mr. Beeston had the benefit of a life insurance policy with Zurich Insurance. There is a dispute between the parties about the amount of the benefit, Mr. Beeston asserting that the benefit was $500,000.00 rather than $250,000.00.

16 Under the Zurich policy, Mr. Beeston also received long term disability benefits; the parties agree that the long term disability benefits continue past December 15, 2009.

17 After Mr. Beeston filed his claim and notice of motion applying for an interim injunction pending trial, Nations Petro agreed to continue to pay benefit premiums to the end of June to permit a proper adjudication of the application in special chambers - the cost of those premiums to be "in the cause". On June 22, 2010, the case management judge ordered Nations Petro to maintain the Plaintiff's benefits until trial.

18 The Cigna contract, which provided health care benefits, included the following termination clause:

> **Termination of Insurance**
>
> **Employees**
>
> Your insurance will cease on the earliest date below:

* the date you cease to be in a Class of Eligible Employees or cease to qualify for the insurance;
* the date the policy is cancelled;
* the date your Active Service ends except as described below.

Any continuation of insurance must be based on a plan which precludes individual selection.

Temporary Layoff or Leave of Absence

If your Active Service ends due to temporary layoff or leave of absence, your insurance will be continued until the date your Employer: (a) stops paying premium for you; or (b) otherwise cancels your insurance. However, your insurance will not be continued for more than 60 days past the date your Active Service ends.

Injury or Sickness (For Medical and Dental Insurance)

If your Active Service ends due to an Injury or Sickness, your insurance will be continued while you remain totally and continuously disabled as a result of the Injury or Sickness.

However, your insurance will not continue past the date your Employer stops paying premium for you or otherwise cancels the insurance.

...

Special Continuation of Medical Insurance (Applicable only to Canadian Expatriates who repatriate to Canada)

If your Active Service ends because of termination of employment, your insurance will be continued provided the required premium is paid by your Employer, but not beyond the earliest of:

* the number of full months elected not to exceed 3 months from the date your Active Service ends;
* the last day for which the premium is paid;
* the date the policy cancels.

19 The Zurich contract which provides long-term disability coverage which continues, and life insurance benefits, included the following termination clause:

Art. 12 Cessation of Cover

Cover ceases for an insured staff member;

...

12.3 after the last day of paid service in case of leaving the Company before age 70 for GL/AD&D/PTD and age 65 for LTD/TTD;

20 In his amended Statement of Claim, Mr. Beeston gave the following information about the contract on which he relied:

> 7. Prior to his disability, the Plaintiff paid for and received, as part and parcel of his employment with the Defendants, employment benefits including group medical and group life coverage. The Plaintiff and the Defendants agreed that the Plaintiff's employment benefits would continue throughout his periods of disability ("Benefits Agreement"). The employment benefits included Group Life Insurance and Group Medical Coverage. The Plaintiff relied upon his Group Medical coverage to receive repeated treatments, surgeries and extensive medical care at the Mayo Clinic in Scottsdale, Arizona, and as a result of the care received at the Mayo Clinic, which was made possible by the Group Medical benefits offered by the Defendants, the Plaintiff's cancers have been held in control.
> 8. The Defendants agreed to continue the Plaintiff's employment benefits in consideration of his loyalty and service to the company in extreme conditions of employment, and did in fact provide those benefits as agreed independently of any obligation to do so pursuant to the Plaintiff's written employment contracts. As a result of this agreement, the Plaintiff returned to employment with the Defendants after the first and second periods of disability. The Plaintiff remains on disability at the present time.

21 Mr. Beeston does not contest Nations Petro's right to terminate his employment without cause; he merely states that he has a collateral agreement with the defendant requiring them to pay all of the medical and life insurance benefits which he had while employed after his employment terminated.

22 At the time of the hearing before the case managing judge, the relatively imminent termination of both the Cigna health benefits group plan and the Zurich life insurance and long term disability plan were put to the court, without details of the way in which Cigna and Zurich were interpreting their respective policies.

23 Since the hearing before the case managing judge, Nations Petro has received communications from both Cigna and Zurich stating that coverage cannot be continued for Mr. Beeston and, indeed, that the Cigna coverage expires altogether in February 2011.

24 Since the hearing before the case managing judge, Nations Petro has made inquiries of its insurance brokers and has been advised that Nations cannot carry insurance that is similar to the Cigna coverage on Mr. Beeston at this time. However, it also learned that Mr. Beeston is or was able to obtain "FollowMe Health" from Manulife if he applies, or had applied, within 60 days of the date when his group coverage ceased. This coverage can be obtained without a medical and is apparently similar to the Cigna coverage except that it does not cover medical expenses outside Canada. Similarly, Blue Cross apparently also provides coverage without medical qualification.

25 In its Demand for Particulars, Nations Petro requested particulars of the benefits agreement referred tin para. 7 of the Amended Statement of Claim including:

- was the alleged benefits agreement written or oral;
- when was this alleged benefits agreement made;
- where was this alleged benefits agreement made;
- which individual made the alleged benefits agreement on behalf of Nations Petro;
- what was the term/duration of the alleged benefits agreement; and,
- what benefits did the alleged benefits agreement apply to.

26 In addition, Nations Petro asked for particulars of the terms of the group coverage which Mr. Beeston clearly benefitted from while employed which he was unable to obtain through an individual replacement policy.

27 Mr. Beeston replied that he was not required to provide the information demanded by Nations Petro because the information requested was in the nature of evidence.

28 Not being involved in the issues raised in this special chambers application, Citic Canada Petroleum Ltd. did not appear at the hearing.

29 At the original hearing, the case management judge offered to hear any request by the parties for modification of the order, but also made it clear that, given the tight time lines which had to be imposed if the trial were to be held by February 2011, the parties had to have this application for variation heard before the end of October, 2010 and, if necessary, would have to go before another judge.

30 An extract from the case managing judge's reasons for imposing the interim injunction is set out at Appendix A.

b) Legislative

31 Alberta's current Rules of Court include the following provision relating to the content of pleadings:

> 104. Every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

32 The Rules of Court that will come into effect next week on November 1, 2010, include the following under Part 13, Technical Rules, Division 3, Pleadings, Rule 13.6(2)(a) which reads as follows:

> 13.6(2) A pleading must state any of the following matters that are relevant:
>
> (a) the facts on which a party relies, but not the evidence by which the facts are to be proved;

33 The new Rules of Court also contain the following foundational rule:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
> (b) to facilitate the quickest means of resolving a claim at the least expense,
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
> (d) to oblige the parties to communicate honestly, openly and in a timely way, and
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

2. Health benefits and life insurance coverage

34 Although Nations Petro is entitled to apply for a variation of the case management judge's order, it has not established that such a variation should be granted.

35 Although Mr. Beeston has mildly objected to the applicant's right to bring this application, it is clear that the case management judge authorized either party to come back before him if relevant new information about benefits were obtained prior to the commencement of the trial. New information was obtained by Nations Petro; it was therefore authorized to ask for a variation.

36 The case management judge was explicitly alive to the difficulty that any other judge might have in varying the injunction which he had granted. Nevertheless, the second-best option of having another judge deal with the matter was obviously preferable to having the trial delayed. The parties have therefore had to proceed with the second-best option.

37 I begin my assessment of the application for a variation of the case managing judge's order with a reminder that this application cannot become, in effect, an attempt to have the original request re-heard.

38 I have concluded that nothing which Nations Petro has presented on this application is sufficiently significant to have caused a change in the original assessment. As to the first step in the tripartite assessment, the case managing judge had originally determined that, whether the test is a serious issue to be tried or a strong *prima facie* case, Mr. Beeston had met that test. Nations Petro has not presented anything on this application that was not before the case managing judge on the original application with respect to the first step

39 As to the second step, irreparable harm, the case management judge had originally concluded:

> I am not satisfied that, as urged by counsel for Nations Petroleum, that any matters that Mr. Beeston may suffer if I do not grant this injunction could be readily compensated in damages. Certainly, some of the costs could be calculated that Mr. Beeston may incur in the future if he requires further treatment at the Mayo Clinic or elsewhere. That does not necessarily mean that all of the damages and all of the issues that he may suffer and concerns that he may have if these policies are cancelled could be compensated in damages.

40 In my view, nothing that Nations Petro has advanced on this application changes that analysis: the clearest example of that is that Nations Petro does not present any evidence whatever on this application about whether Mr. Beeston could currently obtain either $250,000.00 or $500,000.00 in life insurance at any price. A claim for the life insurance benefit from the Zurich group plan is presumably one of the claims which Mr. Beeston is making; given his health situation, it may be that Mr. Beeston cannot obtain life insurance coverage of the type provided by the Zurich group plan, or cannot obtain it at a price which is reasonable. A second clear example is that Nations Petro itself has acknowledged that, under the Cigna plan, Mr. Beeston had the ability to attend a health facility in the U.S., such as the Mayo Clinic, and Nations Petro does not suggest that such a benefit can currently be obtained by Mr. Beeston from any health insurer.

41 However, it should be noted here that, until Mr. Beeston provides particulars of his claim to Nations Petro, as discussed under the next heading, Nations Petro will not be in a position to argue whether Mr. Beeston would suffer irreparable damages if the injunction were not granted. Nations Petro is therefore given leave to return to the court to ask for a variation of the injunction once Mr. Beeston has provided the particulars set out below.

42 As to the third step, the balance of convenience, the case management judge had originally concluded (as set out in Appendix A):

> I am very concerned that if I do not grant this injunction today, come June 30th, being the date that the benefits were extended to under the without prejudice agreement, Mr. Beeston will be without any benefits that he currently has and without an opportunity or a potential for replacing those benefits and, ultimately, could be successful on trial of this action and would be in a position where he would have won the battle but lost the war if I do not give this injunction.

43 After careful review of not only the comments made by the case management judge as reproduced above, but also throughout the hearing, a portion only of which are reproduced in Appendix A from pages 35 to 42 of the transcript of the original hearing, although the portion is - in my view - representative, I have concluded that, in weighing and balancing the positions of both parties, the case management judge intended that, at least until February 2011, Mr. Beeston should have the benefits to which he makes a claim. It appears to me that the case management judge must have decided that any inequity to the defendants in having to provide those benefits could be sorted out at trial. I am further of the view that, had he known what Nations Petro found out after the hearing, the case management judge would not have changed the tenor of the order made, except to make it clear that the essence of the order was to require Nations Petro to provide Mr. Beeston with benefits rather than to require Nations Petro to provide coverage through Cigna and Zurich.

44 In coming to that conclusion, I have taken the following into account:

> - the language used by the case managing judge, including such phrases as " Well, then, you are going to have to find somebody to continue Mr. Beeston's benefits" (hearing transcript, p. 40, lines, 29 and 30). In my view, this language establishes that the case managing judge knew that Mr. Beeston had been terminated from his employment and the judge was keenly aware of the fact that it may not be possible to continue the existing group coverage. Although it may not be explicit that he also understood that it may not be possible to replace the existing group coverage

with alternative group coverage, the tenor of his comments taken as a whole convey to me the conclusion that, if necessary, Nations Petro would just have to pay the claimed benefits direct if no group coverage was available. In addition to the words quoted above, I have also noted the case managing judge's insistence that he was granting the relief claimed in Mr. Beeston's notice of motion which focussed not only on preventing Nations Petro from cancelling existing group coverage but also on requiring Nations Petro to continue to provide benefits. In other words, at the hearing, the case managing judge was aware that, for one reason or another, Nations Petro might not be able continue the existing coverage, but that was not a concern to the case management judge. The new information obtained by Nations Petro from both Cigna and Zurich therefore would presumably not have changed the case managing judge's view that benefits should be provided;

- the size of the severance package obtained by Mr. Beeston when he left the employ of Nations Energy and his continuing long term disability payment suggest that the case management concluded that, if Mr. Beeston wrongly obtains benefits prior to the commencement of the trial, he has the financial means to repay Nations Petro for those benefits;

- similarly, it would be possible to conclude that Nations Petro has the financial means to pay for benefits in the interim period prior to trial;

- the new information provided by Nations Petro does not change the previous two presumed findings;

- even if the trial resulted in a finding that Mr. Beeston had a contract with Nations Petro that required the latter to pay health and life insurance benefits despite the fact that Mr. Beeston was no longer an employee, the trial court might take into account any failure by Mr. Beeston to mitigate his loss impose by failing to secure alternative benefits in a costs award.

45 However, Nations Petro has satisfied this court that it is unable to continue the group coverage provided to Mr. Beeston by Cigna and Zurich. Therefore, Nations Petro is entitled to a variation of the existing order which exempts them from any obligation to continue to provide that coverage. Orders should not be made if it is impossible for litigants to comply with them. Moreover, litigants should be vulnerable to contempt proceedings if it is impossible for them to comply with court orders: ***Baloun***, ***Toronto (City)***, ***Broder Estate***, ***Gaunce***, *Injunctions and Specific Performance*. At the same time, Nations Petro must continue to provide the substantive benefits to Mr. Beeston which had formerly been provided in the group policies.

46 In conclusion on this issue, paragraph 1 of the order of June 22, 2010 should be varied to make it clear that Nations Petro is not required to provide group medical and life insurance benefits to Mr. Beeston; however, there will continue to be a requirement that Nations Petro maintain the substance of the Plaintiff's group medical and life insurance benefits as they were immediately prior to the Plaintiff's termination on December 15, 2009 until the trial of this matter.

3. Particulars of benefits agreement

47 Nations Petro has established that it is entitled to particulars of the contract which Mr. Beeston claims to have in relation to ongoing benefits. Within 15 days of the release of this decision, Mr. Beeston will therefore provide particulars on the issues requested by Nations Petro.

48 The Rules require that a plaintiff set out in his Statement of Claim the material facts on which he relies: R. 104. Mr. Beeston has not provided the material facts relating to his assertion that he and Nations Petro "agreed that the Plaintiff's employment benefits would continue throughout his periods of disability", para. 7 of Amended Statement of Claim, and that the consideration for that agreement was Mr. Beeston's "loyalty and service to the company in extreme conditions of employment".

49 The material facts relating to a collateral agreement that contradicts a written contract include all of the items identified by Nations Petro: whether the agreement was oral or written, when the agreement was made, where the agreement was made, which individual made the agreement on behalf of the defendant, what was the term/duration of the agreement, to which benefits did the agreement apply.

50 The authorities cited by the applicant, and which were not contested by Mr. Beeston, assert that the types of facts set out in the Demand for particulars are material and must be pleaded: ***Bilow***, ***Abramsky***, ***Hardwood Forest Products***, ***Beaucage***, ***Dow Chemical Canada Inc.***

51 Although such facts are material in all situations where a contract is a major aspect of a claim, the materiality is amply demonstrated in the specific context of this application. Mr. Beeston asserts that it is not material to know whether an alleged contract is oral or written. Obviously, there are many situations where the format of the contract is critical - for example an alleged contract which disposes of land may well have to be in writing, or an alleged contract with an individual who is now deceased may well have to be in writing. In this particular situation, the written contracts which Mr. Beeston executed with Nations Petro included terms which stated that there were no collateral agreements between the parties and if there were any collateral agreements, those agreements would have to be in writing. So, in this particular case, it is material to know whether the contract alleged by Mr. Beeston is oral or written. As noted earlier, in this particular context, it is important to know when the alleged contract was made because Nations Petro only came into existence after Nations Energy. The place where the contract was made is material to a decision as to which law applies to the contract - for example, the law of Canada, or the law of England, or the law of Indonesia. The name of the individual who made the alleged contract is material as not every individual associated with Nations Petro would have the authority to bind the company. The term or duration of the benefits coverage is obviously material in determining the issue of whether such a contract was made; the length of the alleged coverage may make it more or less likely that the agreement was made. The identification of the benefits claimed is obviously material; as noted above, without knowing whether Mr. Beeston is claiming continuing life insurance coverage, and in what amount, Nations Petro can't even address the issue of whether an interim injunction is appropriate.

52 As to the issue relating to the coverage which Mr. Beeston can obtain, it is clear from his representations at this hearing that he is able to obtain some coverage; it is therefore material to know what benefits he cannot obtain.

53 With respect, Mr. Beeston is also incorrect when he asserts that Nations Petro's requests amount to requests for evidence. To give only one or two examples: stating that the agreement was oral does not require the plaintiff to disclose the evidence by which he will prove that there was an oral agreement. He can prove that there was an oral agreement by *viva voce* evidence from Mr.

Beeston, by tendering as an exhibit a recording made by Mr. Beeston of a telephone conversation in which someone from Nations Petro made the promise, or by tendering as an exhibit a contemporary day timer entry in which Mr. Beeston recorded a dinner meeting with a representative of Nations Petro during which a promise was given, or by tendering a letter sent by Mr. Beeston the day after an oral promise was made to provide benefits after employment terminated confirming the promise and thanking Nations Petro for its amendment to the existing signed agreement. All of these latter are evidence; Nations Petro is not asking for evidence, just for the material facts.

54 Finally, the court notes that Rule 1.2(2) of the new Rules of Court which will come into force next week remind us of the purpose of pleadings:

> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
> (b) to facilitate the quickest means of resolving a claim at the least expense,
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
> (d) to oblige the parties to communicate honestly, openly and in a timely way, and
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

55 Requiring Mr. Beeston to provide particulars carries out each of the objectives set out in the new Rules. It is highly inappropriate to urge, as Mr. Beeston has done, that Nations Petro should, instead of clarifying the ground rules at the outset, just start out on an examination for discovery to try to find out what this lawsuit is all about. It is as much in Mr. Beeston's interest, as in that of the other parties, to begin and prosecute this lawsuit in an honest, open and timely way.

4. Costs

56 If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

J.B. VEIT J.

* * * * *

Appendix A

I am very concerned that if I do not grant this injunction today, come June 30th, being the date that the benefits were extended to under the without prejudice agreement, Mr. Beeston will be without any benefits that he currently has and without an opportunity or a potential for replacing those benefits and, ultimately, could be successful on trial of this action and would be in a position where he would have won the battle but lost the war if I do not give this injunction.

I am granting the interim injunction. The benefits will continue. I would suggest that counsel may have to work as to how those benefits are going to continue because I appreciate Mr. McPhail's arguments that they may be in a position of not being able to continue the CIGNA policy beyond a particular date, I think, in February of 2011. Counsel are going to have to work together to preserve those benefits, but I as a judge on this court am not prepared to cancel Mr. Beeston's benefits without him having had an opportunity to argue this matter fully.

Which brings me to the condition, Mr. Belzil, that it is a condition of this decision that Mr. Beeston shall pursue the litigation against Nations Petroleum Company Limited and CITIC Canada Petroleum Limited on an expeditious basis. I am not suggesting that there was any indication that that would not happen, but that is clearly a condition here.

MR. BELZIL: Sir, is that ... a term of the order, or shall Mr. Beeston file an undertaking to that effect?

THE COURT: Put it in as a term of the order.

.....

MR. MCPHAIL: Well, there's two separate issues. The Zurich issue: That's fine. If my friend has got more information from Zurich, that's fine. We'll sort that out. And I would just - I agree with him that we can perhaps leave that for you to sort out when we finalize the order. But that hasn't solved the problem around CIGNA, because we cannot continue that.

THE COURT: Well, then, you are going to have to find somebody to continue Mr. Beeston's benefits.

MR. MCPHAIL: Pardon me?

THE COURT: Then you are going to have to find some way to continue Mr. Beeston's benefits, are you not? I mean, I think that is what Mr. Belzil was alluding to.

MR. MCPHAIL: Mr. Beeston? Mr. Belzil's whole argument is:

> We agreed to provide insurance coverage. Is the suggestion that instead of providing insurance coverage, we will pay for medical expenses on any basis that he chooses to incur them, anywhere in the world? Because that's very different from the terms of the order that was first announced.

THE COURT: Well, I am not sure what you are asking, Mr. McPhail. You are --

MR. MCPHAIL: I'm just trying to get clarification on what the order would be, Sir. Is it -

THE COURT: Well, the order is -

MR. MCPHAIL: - that we're required to continue to pay premiums for the CIGNA policy and the Zurich policy? That we are until the trial of the action, and that -- well, I'm -- I -- Sir, it's unlikely we'll get to trial before February, I would think. And I would hope that we could resolve this now, rather than having to come back to you or somebody else in January to try to deal with things.

THE COURT: Well, I think you had better come back in front of me. No one else is going to want to deal with this after I have heard this.

The application, Mr. McPhail, is that the defendants be enjoined from cancelling or terminating Mr. Beeston's group medical benefits and other benefits to which he was entitled as of December 15th, 2009, and requiring the defendants to maintain Mr. Beeston's benefits as they were as of December 15th. My order is granting that application. My reasons were as I articulated.

...

So, just to be clear, we are dealing only with Nations, and the order, then, that is granted is in accordance with the relief sought in paragraph 1 of the notice, the first paragraph 1 of the notice of motion.

MR. MCPHAIL: Sir, would you be amendable to us, because of your intimate knowledge of these matters, that we approach you about if there was a need to try to expedite these proceedings, so we could get to trial in short order? Is that appropriate?

THE COURT: Sure. I'd be happy to do that. And, yes, you can approach me on any matters on it.

...

THE COURT: I would be happy to. And any matters to resolve the terms of the order or anything that might flow from what you might find out from either Zurich or CIGNA as well. I would be happy to do that. And if you can get on for trial before February ...

cp/e/qlcct/qlvxw/qljxr

Tab 12

Indexed as:

Metro Waste Paper Recovery Inc. v. Richter and Partners Inc.

Between
Metro Waste Paper Recovery Inc. and J. & F. Waster Systems Inc., plaintiffs, and
Richter and Partners Inc., defendant

[1997] O.J. No. 3525

Court File No. 97-CV-129548 Commercial List File No. B-213/97

Ontario Court of Justice (General Division)
Commercial List

Ground J.

Heard: August 15, 1997.
Judgment: September 2, 1997.

(3 pp.)

Injunctions -- Mandatory injunctions -- Bars.

Motion by the plaintiffs for a mandatory order restraining the defendant from selling certain assets to a third party. The plaintiffs argued that a binding agreement existed pursuant to which the assets were to be sold to the plaintiffs. The defendant was the Trustee and Interim Receiver of the company owning the assets in dispute.

HELD: Motion dismissed. The motion and action were ill conceived since the defendant did not own the assets and had no authority to convey them. The court was not satisfied that there existed an enforceable agreement for the sale of the assets to the plaintiffs. The plaintiffs failed to establish a prima facie case, irreparable harm and the balance of convenience favoured the refusal of the mandatory order and to permit the sale to the third party.

Counsel:

Frank I. Liebeck, for the plaintiffs.
Alan H. Mark and Nando De Luca, for the defendant.

1 **GROUND J.**:-- I concur with Mr. Mark's submission that this action and motion are ill-conceived. Richter, either in its capacity as Trustee under the Proposal or as Interim Receiver, clearly did not own the assets and had no authority to convey the assets. A mandatory order can not issue directing a party to do something which is impossible of performance by that party and the motion should be dismissed on that ground alone.

2 Having said that, I would not have granted the order even if the motion had been properly brought in an action commenced against the proper party.

3 On the evidence before me, I am not satisfied that a binding and enforceable agreement was ever entered into providing for the sale of the assets to the plaintiffs. Mr. Metauro's evidence as to what transpired at the meeting of July 7 does not, in my view, have a ring of truth, particularly when examined in the light of the evidence of Mr. Harlang and the documentary evidence. In any event, there is no evidence that the approval of the directors of the vendor companies or the consent of the Bank, which the plaintiffs acknowledge was required, were ever obtained. There is the further problem that the Statute of Frauds has not been complied with. The plaintiffs are, in my view, a long way from having a strong prima facie case required for the issuance of a mandatory order.

4 In addition, there is no evidence before me that the plaintiffs will suffer irreparable harm and the balance of convenience is clearly on the side of refusing the mandatory order and permitting the sale of the assets to Miller to be completed on Monday to keep the business in operation, to ensure the continuance of the contract with Durham Region, to prevent the continuing increase in indebtedness of Durham Materials Recovery Facility to the Bank and to facilitate the payments to creditors of Durham Materials Recovery Facility.

5 The motion is dismissed.

6 Costs of this motion in the amount of $500 payable to counsel for Miller forthwith, costs to the defendant on a solicitor-client scale in an amount to be agreed to between counsel or, failing agreement, to be fixed by me.

GROUND J.

qp/d/ala/DRS

Tab 13

Case Name:

Bell Expressvu Limited Partnership v. Morgan (c.o.b. www.modchipit.com)

RE: Bell Expressvu Limited Partnership, Echostar Satellite LLC, Echostar Technologies Corporation and Nagrastar LLC, and David Morgan a.k.a. David Edward Morgan c.o.b. as www.modchipit.com, David Morgan c.o.b. as Modchipit, Modchipit, Josephine Morgan, Sharon Alberta Morgan, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants
AND RE: Echostar Satellite LLC, Echostar Technologies Corporation and Nagrastar LLC, and David Morgan a.k.a. David Edward Morgan c.o.b. as www.modchipit.com, David Morgan c.o.b. as Modchipit, Modchipit, Josephine Morgan, Sharon Alberta Morgan, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants

[2008] O.J. No. 1144

165 A.C.W.S. (3d) 1090

65 C.P.R. (4th) 316

58 C.P.C. (6th) 324

2008 CarswellOnt 1898

Court File Nos.: 06-CL-6338, 06-CL-6339

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: November 13, 2007 and March 3, 2008.
Judgment: March 25, 2008.

(59 paras.)

Civil Litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Injunctions -- Preservation of property -- Anton Piller orders -- Defendants' motion to vary or set aside Anton Piller orders and injunctions, for damages and to dismiss the action dismissed -- Plaintiffs demonstrated a strong prima facie case, the alleged deficiencies in the orders did not form a basis to set them aside and allegations of misconduct could only be determined at trial -- Balance of convenience favoured a continuation of the injunctions -- Damages were not contemplated by the motion and the motions judge could not make determinations of credibility or findings of fact -- Loss of the evidence was insufficient to dismiss the action.

Motion by defendants to vary or set aside Anton Piller orders and injunctions, dismiss the action and require the plaintiffs to pay the defendants damages for the loss of evidence. Plaintiffs alleged that the defendants were engaged in the marketing, sale and distribution of technology designed to steal the plaintiffs' encrypted satellite television programming. Substantially all of the evidence seized on the execution of the orders was stolen from a storage locker into which it had been placed by the Independent Supervising Solicitor. Defendants alleged the orders should be set aside on three grounds: the failure of the plaintiffs to demonstrate a strong prima facie case of misconduct, certain alleged deficiencies in the orders and a pattern of behaviour by the plantiffs that should disentitle them to a continuation of the orders.

HELD: Defendants motion dismissed. The plaintiffs demonstrated a strong prima facie case. The theft of the evidence made the plaintiffs' case more difficult to prove, but did not displace the probative effect of the evidence provided to the court at the time of the ex parte orders. There was no basis to set aside the Anton Piller orders on the grounds of the alleged deficiencies and any such order would be moot, as any order for the return of the lost evidence would be of no effect. The allegations of misconduct required a trial for a determination of the relevant. The balance of convenience favoured a continuation of the injunctions directed at activities involving the sale of Piracy Technology. Defendants were not entitled to damages equal to the value of the stolen evidence as this relief was not contemplated on the motion and the motions judge could not make determinations of credibility or findings of fact. The loss of the evidence was insufficient to succeed on a motion to dismiss the action; if the defendants wished to have this matter determined by the court they needed to bring a summary judgment motion setting out the additional relevant factual evidence upon which they relied. In the absence of any evidence contradicting that the defendants were properly the subject of the Anton Piller orders the defendants' argument that the plaintiffs' actions should result in a dismissal of the action were rejected.

Statutes, Regulations and Rules Cited:

Counsel:

Ian W.M. Angus, for the Defendants/Applicants.

Christopher D. Bredt and *Catherine Moreau*, for the Plaintiffs/Responding Parties.

ENDORSEMENT

1 **H.J. WILTON-SIEGEL J.**:-- This is a motion brought by the defendants to vary or set aside *Anton Piller*, [1976] 1 All E.R. 779, orders and injunctions granted by Mesbur J. on March 20, 2006 in both proceedings (the "Orders"). The Orders, which are substantially identical, were continued to trial, without prejudice to the right of the defendants to move to set aside the Orders, by further orders dated March 29, 2006 of Morawetz J., after a hearing which the defendants chose not to attend. The circumstances are unique in that the evidence seized on the execution of the Orders on March 21, 2006 (the "Evidence") was stolen at some point between April 5, 2006 and May 26, 2006 from a storage locker into which the Evidence had been placed by the Independent Supervising Solicitor (the "ISS").

Background

2 The statements of claim of the plaintiffs allege that, through an internet mail order business known as "Modchipit", the defendants were engaged in the marketing, sale and distribution of Piracy Technology (as defined in the Orders) designed to steal the encrypted satellite television programming of the plaintiffs.

3 Following the execution of the Orders, the Evidence was placed in a storage locker rented by the ISS. On April 5, 2006, the defendant, David Morgan, and a representative of the plaintiffs, together with a representative of the ISS, visited the storage locker for the purpose of reviewing the Evidence and requesting copies of particular items. Subsequently, on May 26, 2006, Mr. Morgan and a representative of the ISS attended at the storage facility for the purpose of taking copies of certain financial information, including the money orders referred to below. At this time, they discovered that substantially all of the Evidence had been stolen.

4 The Toronto Police Services has laid charges in respect of the theft but none of the Evidence has been recovered. It is understood that the Toronto Police Services is continuing to investigate the circumstances of the theft.

Issues

5 The relief sought by the defendants on this motion evolved in the course of argument. Ultimately, it falls into four categories:

1. orders setting aside the *Anton Piller* orders;
2. orders setting aside the injunctions;
3. orders dismissing the actions; and
4. orders requiring the plaintiffs pay the defendants damages for the loss of the Evidence.

I will address each in turn.

The Anton Piller Orders

6 The defendants argue that the Orders should be set aside in their entirety on three grounds: (1) the failure of the plaintiffs to demonstrate a strong *prima facie* case of misconduct; (2) certain alleged deficiencies in the Orders; and (3) a pattern of behaviour at the time of execution of the Orders and thereafter that they say should disentitle the plaintiffs to a continuation of the Orders. These issues are addressed in turn.

Applicable Law

7 The circumstances in which an *Anton Piller* order have been set aside were reviewed by Farley J. in *Ontario Realty Corp.* v. *P. Gabriele & Sons Ltd.*, [2000] O.J. No. 4341. The most usual instance is that of a failure of the applicant to make full and frank disclosure of all relevant material facts.

8 The following statements, cited with approval in *Ontario Realty Corp.*, respecting the principles applicable on a motion to set aside an Anton Piller order after execution of the order are also relevant for the issues on this motion.

9 First, in *WEA Records Ltd.* v. *Visions Channel 4 Ltd.* et al, [1983] 2 All E.R. 589 (C.A.) at 594, Donaldson M.R. expressed the view that any injustice suffered by the making of such an order is properly addressed at trial by way of a claim for damages:

> In the instant case the Anton Piller order is spent in the sense that it has been executed. However, the defendants seek to go back to the beginning of the action saying that, regardless of whether the fruits of the order are such as to show that it was abundantly justified, the judge had insufficient material to justify his action at the ex parte stage. They therefore invite us to set the ex parte order aside and to order the return of the affidavits to the two personal defendants and the seized material to the defendants' solicitors.
>
> I regard this as wholly absurd. The courts are concerned with the administration of justice, not with playing a game of snakes and ladders. If it were now clear that the defendants had suffered any injustice by the making of the order, taking account of all relevant evidence including the affidavits of the personal defendants and the fruits of the search, the defendants would have their remedy in the counter-undertaking as to damages. But this is a matter to be investigated by the High Court judge who is seised of the matter, and only when he has reached a decision can this court be concerned.

10 Second, in *Dormeuil Frères SA et al.* v. *Nicolian International (Textiles) Ltd.*, [1988] 3 All E.R. 197 (Ch.D.) at 199, Browne-Wilkinson V-C addressed the same issue, as well as the approach to the companion injunctions:

> Where an Anton Piller Order has been made ex parte, in the vast majority of cases the order has been executed before the inter partes hearing. Setting aside the Anton Piller order cannot undo what has already been done. As to the injunction contained in the ordinary Anton Piller order, that is directed to last only until the inter partes hearing of the motion. The correct course, as the Court of Appeal decisions show, is to regulate the matter for the future on the basis of the evidence before the judge on the inter partes hearing. The sole relevance of the question Should the ex parte order be set aside?' is, so far as I can see, to determine the question whether the plaintiff is liable on the cross-undertaking in damages given on the ex parte hearing. That is not an urgent matter. It is normally much better dealt with at the trial by the trial judge, who knows all the circumstances of the case and is able, after cross-examination, to test the veracity of the witnesses.

Alleged Insufficiency of Facts Supporting an Anton Piller Order

11 The specific requirements for an *Anton Piller* order are set out by Binnie J. in *Celanese Canada Inc.* v. *Murray Demolition Corp.*, [2006] 2 S.C.R. 189 at para. 35:

> There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work ...

12 The defendants argue that the plaintiffs did not satisfy the requirements to obtain an *Anton Piller* order at the time of the *ex parte* hearing in that they failed to establish a strong *prima facie* case of misconduct. They argue that the plaintiffs have established only that the defendants possessed piracy hardware that was capable of being used for legal and for illegal purposes. They argue that, in the absence of any evidence that the defendants possessed either piracy software or piracy hardware that was actually being used for illegal purposes, the Court cannot find that there is a strong *prima facie* case that the defendants engaged in any prohibited activity. Using the same argument, they also argue that there is no evidence that the plaintiffs are likely to suffer serious harm as a result of the defendants' activities.

13 A motion to set aside an *Anton Piller* order proceeds as a trial *de novo*. On this motion, the evidence before the Court consists entirely of the evidence before Mesbur J. at the time the Orders were issued and before Morawetz J. on March 29, 2006 when he continued the Orders, together with an inventory or list of the Evidence. The defendants offered no evidence on this motion that contradicted the evidence of the plaintiffs. Instead, the defendants argue that the plaintiffs' case must fail because the Evidence has been lost.

14 However, while the theft of the Evidence undoubtedly makes the plaintiffs' case more difficult to prove, it does not displace the probative effect of the evidence provided to the Court at the time of the *ex parte* Orders, prior to the seizure of the Evidence. I am satisfied that such evidence continues to satisfy each of the requirements of an *Anton Piller* order as set out in the *Celanese* decision.

15 In particular, with respect to the issues raised by the defendants, I am satisfied that the plaintiffs have demonstrated a strong *prima facie* case that the defendants were engaged in (1) selling Piracy Technology devices in circumstances that give rise to a reasonable inference that the devices would be used to steal the plaintiffs' programming; and (2) aiding and abetting the stealing of the plaintiffs' programming by selling Piracy Technology and support services therefor, as well as assisting purchasers of Piracy Technology to obtain internet-based support for such devices, in circumstances that give rise to a reasonable inference that the devices would be used to steal the plaintiffs' programming. For the same reasons, the evidence also establishes a strong *prima facie* case of irreparable harm to the plaintiffs flowing from the loss of business.

Alleged Deficiencies of the Orders

16 The defendants allege that the Orders fail to satisfy the requirements of *Celanese* in three respects, which will be addressed in turn:

1. paragraph (f) of Schedule "A" is too broad;
2. paragraph 22 contravenes the requirements of a limited-use clause; and
3. there is no provision for the return of the Evidence as soon as practicable.

17 In *Celanese*, Binnie J. set out a number of guidelines for the preparation and execution of an *Anton Piller* order at para. 40, of which the following are relied upon by the defendants:

> (1) Basic Protection for the Rights of the Parties
> (i) The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the Anton Piller order and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved". He or she is "an officer of the court charged with a very important responsibility regarding this extraordinary remedy". See also *Grenzservice*, [1995] B.C.J. No. 2481, at para. 85. ...
> (iii) The scope of the order should be no wider than necessary and no material shall be removed from the site unless clearly covered by the terms of the order. See *Columbia Pictures Inc. v. Robinson*, [1987] Ch. 38. ...
> (v) The order should contain a limited use clause (i.e., items seized may only be used for the purposes of the pending litigation). See *Ontario Realty Corp.*, at para. 40; *Adobe Systems*, [1999] 3 F.C. No. 621, at para. 43; *Grenzservice*, at para. 85. ...
> (vii) The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable.

18 I note that the Orders pre-dated the decision of the Supreme Court in *Celanese*.

Analysis and Conclusions

19 I do not think that paragraph (f) of Schedule "A" to the Order contravenes the requirement of the third rule in *Celanese* that the scope of an *Anton Piller* order should be no wider than is necessary. The scope of paragraph (f) is tied directly to evidence of conduct of the prohibited activity.

20 It is arguable that the absence of a provision requiring the return of the Evidence as soon as practicable, and the requirement that the defendants bear the cost of copying any Evidence requested by them, are inconsistent with the principles in *Celanese*. It is also arguable that paragraph 22 of the Orders is too broad in the circumstances of this proceeding insofar as it permits use of the Evidence in any other proceedings commenced against third parties without further order of the Court. On the other hand, there is some force to the plaintiffs' argument that the principles in *Celanese* require some adaptation to instances of alleged technological piracy, particularly in respect of use of the Evidence in proceedings commenced against third parties associated in some manner with the misconduct of the defendants.

21 Notwithstanding these observations, however, there is no basis for setting aside the *Anton Piller* orders on the grounds of the alleged deficiencies in the Orders for two reasons.

22 First, while the alleged deficiencies might, in other circumstances, justify a variation order, they would not support an order setting aside either Order. For such purposes, as set out above, it is

necessary to establish exceptional circumstances such as material non-disclosure or scandalous or abusive behaviour. The seeking and obtaining of the Orders, on their own, does not constitute anything approaching such standard of behaviour, particularly in view of the fact that the Orders pre-dated the decision of the Supreme Court in *Celanese*. The dicta in *WEA Records* and *Dormeuil Frères* affirm that, absent a finding of such behaviour, a motion to set aside an *Anton Piller* order after its execution will be denied on the basis that it is spent.

23 Second, even if the principles in *WEA Records* and *Dormeuil Frères* were not the law in Ontario, the particular circumstances in this action preclude an order setting aside the Orders. The defendants acknowledge that their purpose in seeking an order varying or setting aside the *Anton Pillar* orders is to support a companion order for the return of the lost Evidence. However, given the theft of the Evidence, any such order would be of no effect and any order for the return of the lost Evidence would be incapable of performance. The plaintiffs are not in a position to return the Evidence if the Orders were amended in the manner suggested by the defendants nor are the plaintiffs in a position to use the Evidence in any other proceedings. The Court will not issue orders that are clearly incapable of performance. The proper form of relief is, instead, an order for damages. The defendants' request for this relief is addressed below.

Alleged Misconduct of the Plaintiffs

24 The defendants claim that the plaintiffs' conduct in the execution of the *Anton Piller* orders and in their post-search actions constitutes scandalous and abusive conduct that justifies an order setting aside the Orders.

25 The defendants allege that the following specific activities constituted misconduct on the part of the plaintiffs:

1. the failure of the plaintiffs to honour an alleged agreement to make copies of all documents requested by the defendants;
2. the disclosure to the plaintiffs of certain documentation that it had been agreed would be sealed;
3. the refusal of the plaintiffs to permit the return of a number of money orders from customers of the defendants seized on the execution of the Order;
4. the failure of the plaintiffs to return five hard-drives seized after a reasonable period of time to permit imaging;
5. the failure of the plaintiffs to provide a copy of the electronic data on the defendants' website after deletion of all data on the website in the course of execution of the Orders; and
6. the seizure of unmodified free-to-air receivers (the "FTA's") and/or failure of the plaintiffs to return such FTAs after a reasonable period of time for examination,.

26 This relief is denied for the following reasons.

27 First, as discussed in greater detail below, the defendants' allegations of misconduct have not been established. They require a trial for determination of the facts relevant to the allegations as well as a determination as to whether, on the basis of the facts as so established, any of the plaintiffs' actions are properly characterized as misconduct. Only then would a Court be in a position to assess

whether any of the plaintiffs' actions were so scandalous or abusive as to justify any relief, including an order setting aside either or both of the Orders.

28 Second, as mentioned, the *Anton Piller* orders have been executed and any order setting aside the Orders would be moot. For the reasons set out above, even if the Court were to find that the plaintiffs misconducted themselves in the course of the seizure and/or thereafter, it is therefore highly doubtful that the Court would find that the proper relief included an order setting aside the Orders. As stated in *Dormeuil Fréres*, the Court cannot undo what has already been done. The defendants acknowledged this indirectly at the hearing in stating that their purpose in seeking such an order was to "open the door" to their claims for damages. This relief can, and should, however, be addressed directly by seeking a determination as to whether the plaintiffs' actions constituted actionable misconduct for the purposes of damages. It is unnecessary, and improper, to seek such relief indirectly by seeking an order setting aside the *Anton Piller* orders.

Injunctions

29 Paragraph 1 of the Orders contains an injunction directed at the defendants and other persons with respect to the carrying on of certain activities in respect of the sale of products and services relating to the use of Piracy Technology. While the defendants' primary focus on this motion has been on setting aside the *Anton Piller* orders, the defendants also seek an order discharging the injunctions. There is, in this respect, an important difference. While the *Anton Piller* orders have been executed, the injunctions are continuing.

30 The three-part test applicable to an interim or interlocutory injunction is set out in *RJR-MacDonald* v. *A.G. Canada,* [1994] 1 S.C.R. 311 at para. 43. I have proceeded on the basis that a motion to set aside an injunction also requires a hearing *de novo*. As mentioned above, the evidence before the Court consists entirely of the materials put before Mesbur J., apart from the evidence and submissions of the parties respecting the conduct of the search and the plaintiffs' conduct thereafter together with an inventory or list of the Evidence.

31 The first requirement of the test in *RJR-MacDonald*, demonstration of a *prima facie* case of actionable misconduct against the defendants, has been addressed above in respect of the more stringent requirements of the *Anton Piller* orders. It necessarily follows from the determination above that the plaintiffs have established a *prima facie* case of an actionable claim against the defendants.

32 The defendants do not take issue with the finding that the second requirement of the test for an injunction, being demonstration of irreparable harm, has been satisfied.

33 With respect to the balance of convenience, however, the defendants argue that the loss of the Evidence is a relevant factor to be considered. Although the defendants did not raise the alleged conduct of the plaintiffs during and after the search, I have also considered whether such allegations are relevant in respect of an assessment of the balance of convenience.

34 Notwithstanding these possible considerations, I am satisfied that the plaintiffs have demonstrated that the balance of convenience favours continuation of the injunctions. The injunctions are directed at activities which involve the sale of Piracy Technology. The balance of convenience must be assessed solely in the context of an injunction for this purpose. The defendants have not provided any substantive reason why the balance of convenience favours a discharge of the injunctions. For this purpose, the loss of the Evidence is not a relevant consideration once the Court has concluded that

a *prima facie* case has been established. Subject to the observation below, neither is any misconduct of the plaintiffs on or after the search, even if established.

35 Accordingly, I find the balance of convenience continues to favour the plaintiffs.

36 I acknowledge that a finding of misconduct on or after the search might disentitle a plaintiff to continuation of an injunction on the basis of a lack of clean hands if the misconduct were determined to be so scandalous or abusive as to disentitle the plaintiff to the exercise of the Court's discretion. However, no such finding of misconduct has been made in this action to date.

37 Based upon the foregoing, I conclude that there is no basis for setting aside the injunctions at this time.

Defendants' Claims for Damages

38 Ultimately, in the course of the hearing, it became clear that the principal relief sought by the defendants at this time is an order dismissing the actions requiring the plaintiffs to return the Evidence or to pay damages for the loss of the Evidence pursuant to the undertakings given at the time the Orders were granted.

39 The defendants' position in seeking both heads of relief is that the plaintiffs' alleged misconduct, detailed above, resulted in an unreasonable retention of the Evidence which, in turn, resulted in the defendants' loss of both the monetary value of the Evidence, particularly the lost money orders, and the ability to conduct their defence to the actions. Their argument is that, but for such unreasonable retention of the Evidence, the defendants would not have suffered the loss of the Evidence.

40 The issue of prejudice to the defendants' ability to conduct their defence is addressed in the next section of this Endorsement. In this section, the issue is limited to the defendants' request for a determination that, on the evidence before the Court, they are entitled to damages equal to the value of the stolen Evidence. This relief is denied for the following reasons.

41 First, it is clear from the defendants' notice of motion and accompanying materials, as well as the argument of both counsel at the hearing, that this relief was not specifically contemplated on the motion brought by the defendants. Accordingly, none of the parties has filed a complete record of the evidence upon which it relies in respect of this issue and the plaintiffs did not address this issue in their cross-examination of Mr. Morgan.

42 Second, and more importantly, whatever the merits of the defendants' claims for damages, in order for the Court to grant the requested relief, it would be necessary for the Court to determine as a matter of mixed fact and law that the conduct of the plaintiffs caused or contributed to the loss suffered by the defendants. As a motions judge, I cannot make determinations of credibility or findings of fact, by inference or otherwise, except where there can be no other reasonable finding on the basis of the facts before the Court. In this proceeding, therefore, the Court would only be in a position to make any determination regarding the plaintiffs' conduct if the relevant facts were not in dispute. While the defendants allege that this is the case, I think it is clear that there are material facts in dispute that require a trial of this issue for determination that are relevant to the alleged liability of the plaintiffs for the defendants' loss. The disputed facts include the following matters.

43 First, the plaintiffs say that they advised Mr. Morgan of his entitlement to take copies of all documentary Evidence and that he chose not to do so. On this basis, they argue that the plaintiffs cannot be held responsible for the loss of the Evidence as a matter of causation. Mr. Morgan appears to dispute this allegation on both factual and legal grounds. As a related matter, the parties dispute

whether the plaintiffs agreed to photocopy all documents requested by the defendants. Mr. Morgan alleges there was such an agreement. Mr. Zibarris alleges the agreement was restricted to documentation necessary for Mr. Morgan to prepare tax returns.

44 Second, the parties dispute the circumstances of the deletion of all of the website data. The plaintiffs say that Mr. Morgan consented to such deletion. Mr. Morgan says he was forced involuntarily to "kill" the website. This has implications for the defendants' position that the plaintiffs must be held partly or fully responsible for the loss of the Evidence.

45 Third, there is a serious issue as to whether any of the Evidence could have been re-created after the theft but for the activities of Mr. Morgan. The plaintiffs say that, based on Mr. Morgan's use of a "Window Washer" software programme on the computers retained by him following the seizure of the Evidence, it is possible that documentary evidence that had been saved, or could have been re-created, was deleted by Mr. Morgan. They say this evidence could have included customer information permitting identification of the lost money orders and would have thereby prevented any loss.

46 Fourth, the evolution of the parties' positions with respect to the cashing of the money orders and the retention of the proceeds thereof, and the reasonableness of their positions, is hotly disputed by the parties.

47 Fifth, the defendants say that the plaintiffs improperly seized unmodified FTA's. The plaintiffs say that they seized all FTA's to test them to determine whether or not they were modified. The nature, extent and timing required to complete such testing is not before the Court on this motion nor are the results of any such testing. The Court cannot, therefore, come to a conclusion as to the reasonableness of the continued retention of the FTA's up to the time of the theft.

48 Lastly, there are many issues in dispute with respect to the quantum of the defendants' claim that require a trial. In particular, the parties dispute the face value of the money orders stolen as part of the Evidence. In addition, the extent to which the Evidence that was stolen included hardware that was not Piracy Technology has yet to be established and its value quantified. Finally, as a related matter, in the action the plaintiffs are asserting a substantial claim for damages against the defendants which, if successful, could partially or completely offset any damage award in favour of the defendants. Such issue should be tried at the same time as the defendants' claim for damages.

Dismissal of the Action

49 The defendants also seek orders dismissing the actions in their entirety based, essentially, on the loss of the Evidence. The defendants make two arguments in support of such relief which are set out below.

50 Both arguments proceed from the view that, because the plaintiffs structured the Orders on a basis that failed to provide for the return of the Evidence within a reasonable period of time as contemplated by *Celanese*, the plaintiffs cannot rely on the defendants' failure to take copies of the Evidence prior to its loss and must bear the consequences of the loss.

51 First, the defendants say that they have been prejudiced as a result of the loss of the Evidence in that they cannot present their defence in the actions. That may well be. On the other hand, the plaintiffs say, with some force, that the remaining evidence, being the evidence put forward on the application for the Orders, is, by itself, sufficient to succeed at trial.

52 The defendants therefore rely solely on the loss of the Evidence and their allegations that the plaintiffs are responsible for the loss in support of their request for a dismissal of the action. I think this is insufficient to succeed on such a motion. The loss of the Evidence by itself is not determinative of the issue of prejudice and the ultimate responsibility for the loss is irrelevant (unless the loss were due to the defendants' actions). The important point is that there is no reason or evidence put forward by the defendants that suggests that the Evidence would have provided a defence to the plaintiffs' allegations regarding the defendants' business. Accordingly, the evidence before the Court on the issue of prejudice is not sufficient at this time to demonstrate prejudice that would entitle the defendants to the requested relief.

53 If the defendants wish to have this matter determined by the Court, they must, therefore, bring a summary judgment motion or other proceeding setting out the additional relevant factual evidence upon which they rely taking into consideration the evidence before Mesbur J. at the time the Orders were granted.

54 The defendants' second argument is that the action should be dismissed on the grounds of the plaintiffs' alleged misconduct, the specifics of which are set out above. They argue that the plaintiffs acted improperly in two separate respects, detailed below, and that, if an order for damages is unavailable at this time, the Court should indicate its disapproval of such conduct by dismissing the actions.

55 First, the defendants say that some or all of the actions above were taken intentionally with a view to shutting down the defendants' business. They argue that such a motive exceeds the permissible purposes of an *Anton Piller* order and should, accordingly, attract a sanction in the form of a dismissal of the action.

56 In order to succeed on this basis, the defendants must establish that they were not properly the subject of the Orders. To do so, given the plaintiffs' evidence before the Court, the defendants must adduce evidence that contradicts such evidence and establishes that they did not carry on a business whose principal purpose was the sale of Piracy Technology devices and support services. Their defence - that the theft of the Evidence prevents them from proving this defence - does not address the evidence presented by the plaintiffs to Mesbur J. before the Orders were obtained.

57 In the absence of any evidence to this effect before the Court on this motion, the argument must be rejected. I would note, as well, that if such evidence were adduced, a trial would be required to determine the nature of the defendants' business. Ultimately, the success or failure of any proceeding to set aside the Orders on this basis will depend upon whether the plaintiffs are successful at trial in this action.

58 The defendants' second argument is that the plaintiffs' alleged misconduct was sufficiently unreasonable as to be scandalous and abusive. This argument must fail for the same reason that the claim for damages on this ground was rejected. There are material factual issues pertaining to the conduct of both parties that require a trial in order to assess the plaintiffs' conduct on and after the execution of the Orders. Until such time as these factual issues are determined, the Court cannot address a motion for dismissal of the action.

Costs

59 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of

the other party's submission to provide the Court with any reply submission they may choose to make. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

H.J. WILTON-SIEGEL J.

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IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

BOOK OF AUTHORITIES OF SINO-FOREST CORPORATION

(Motion Returnable April 20, 2012)

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